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# Conceiving Due Process

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# Conceiving Due Process

Cynthia R. Farina<sup>†</sup>

*"No answer is what the wrong question begets . . . ."*<sup>1</sup>

We seem unable to make peace with procedural due process.<sup>2</sup>

To be sure, in the twenty years since *Goldberg v. Kelly*<sup>3</sup> the Supreme Court has come to speak in the clear, strong tones of doctrinal certainty. It now deals deftly with claims that people have been mishandled by their government, first culling out those who can point to no "entitlement" and then weighing up, for those who remain, just how much process the system can afford. Once-sharp and fundamental debates on the Court about the nature, scope, and purpose of procedural due process in the administrative state have subsided into occasional squabbles among the justices about the margins of the doctrine and sporadic disagreements over its specific application.

Do not, however, mistake this lessening conflict on the Court for some emergent consensus that procedural due process has been brought, at last, through the turbulent years of rapid growth to a stage of doctrinal maturity and sophistication. Scratch the smooth, plausible skin of the doctrine and there lies turmoil, contradiction, and instability, a pathological combination of ineffectualness and destructiveness. For years, commentators have warned of this, in terms ranging from dignified rebuke<sup>4</sup> to near evangelical condemnation.<sup>5</sup> Indeed, the doctrine's most remarkable quality may be its ability to transcend traditional boundaries and unite, in thorough-going disapproval, those on the political left and right, constitutional theorists and administrative law scholars, academics and practitioners, Kantians, utilitarians, and Hegelians.<sup>6</sup> Procedural

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This article is dedicated to the memory of Mary Joe Frug, from a student whom she continues to teach.

1. ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* 103 (1962).

2. The Fifth Amendment of the Constitution provides: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The Fourteenth Amendment extends this prohibition to the States.

3. 397 U.S. 254 (1970) (extending procedural protection to termination of welfare benefits).

4. E.g., Timothy Terrell, *Liberty and Responsibility in the Land of "New Property": Exploring the Limits of Procedural Due Process*, 39 U. FLA. L. REV. 351, 352 (1987) ("the Court's failure to identify any consistent, meaningful, or comprehensive theory of the due process clause").

5. E.g., Edward Rubin, *Due Process and the Administrative State*, 72 CAL. L. REV. 1044, 1065 (1984) ("the current agony of procedural due process"); *id.* at 1083 ("a jurisprudential Armageddon").

6. Of course, the grounds of criticism and the proposed solutions vary dramatically. See Part II *infra*.

due process is ringed by criticism, and the Court's increasingly single-minded entrenchment in that doctrine seems the exhausted stubbornness of those who must continue to function in the face of protracted siege.

I began this article as an exploration of the problems with contemporary procedural due process jurisprudence. But, as I read the considerable literature produced in the last two decades, I started to doubt my original undertaking. Critiques of the doctrine abound. Yet one more seemed unlikely to make a difference. However, as I continued, with almost morbid fascination, to read one devastating attack after another, I realized something else. Several of the most acute and imaginative minds in modern legal scholarship have pushed, and probed, and worried over what's wrong with due process in the administrative state. Why, then, do we seem to make no progress towards getting procedural due process right? That is the question I consider here.

I still begin by exploring the problems with procedural due process jurisprudence: its schizophrenic dependence upon and rejection of the dictates of the legislature, its simultaneous overprotection and underprotection of interactions between people and their government, its contorted view of the value of process. My purpose in this first half of the article is to chronicle how a profoundly troubled doctrine has resisted twenty years of efforts to right it. Just as every story embodies a point of view, so this chronicle is my own synthesis and interpretation of those years. To that end, I have selected, arranged, and connected, across time and political spectrum, so that the doctrine and the criticism it has evoked can be seen as an integrated whole. At the same time, however, I have sought to retain the voices of the courts and commentators who made the jurisprudence, conveying and (at least for the moment) sharing the aspirations and the anxieties they brought to the undertaking. In other words, the synthesis and interpretation that occurs in this first half deliberately takes place *within* the perspective of the prevailing discourse; it is a gathering together of the ways we have been accustomed to think and talk about procedural due process in the regulatory state.<sup>7</sup>

Having told the story of those years in its own terms, I then consider, in the second half of the article, how we might tell a different story. I begin by suggesting that *both* the problems within procedural due process doctrine *and* our inability to solve those problems can be directly traced to the set of assumptions—about human nature, the role of law, and the relations among people and between people and their government—that have thus far engendered our thinking in this area. Where we began has led us, ineluctably, to where we have ended up. These assumptions, once uncovered, may not appear novel or startling. Indeed, their very familiarity, the ease with which we take

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7. Thus, the critiques (of doctrine and scholarly solutions) that I make in the first half accept the terms in which the debate has thus far been cast. My choice to reserve challenges to those terms until the second half is not meant to discourage the reader from approaching the conventional paradigm critically along the way.

them on as the concepts that shape and order our thinking, blinds us to their influence. They are assumptions which have been so embedded in our legal culture as to seem inevitable. And yet, the only thing that is inevitable is that we will be unable to solve the problems in procedural due process doctrine so long as we begin with these assumptions.

And so, finally, I will pose a very different beginning: a set of understandings, drawn from feminist theory, about what people are and need, what law might accomplish, and how we should understand the relationship between the citizenry and the state. And I will sketch (at least, preliminarily) the very different procedural due process that might be brought forth from such origins: a jurisprudence that pursues the connection between a people and their government rather than the autonomy of isolated individuals; that seeks ever-improving solutions within the particularized, living context of actual programs rather than timeless, universal answers from abstract, objective principles; and that strives to create a culture in which public power will be used with care rather than a set of weapons with which its misuse can be defended against. I hope to convince you that these alternative understandings respond, in important ways, to the experience of life in the modern regulatory state, and that they therefore hold the promise of producing the truly humane procedural due process which thus far has eluded us. I hope also to reassure you that, even though these alternative starting points are radically different from where we have been accustomed to beginning, the vision they generate would not be radically disconnected from what we have been thinking, feeling, and attempting. Rather, the effect is that of reversing a damask: woven background becomes foreground, what has been muted is made manifest, a new pattern that has always existed is revealed. But even if you remain unpersuaded of these things, consider the undertaking a heuristic exploration—helping us understand that “the agony of procedural due process” is largely self-inflicted.

## I. THE DOCTRINE

*“A more misspent piece of marvellous ingenuity  
I never read . . . .”<sup>8</sup>*

The current doctrinal analysis proceeds according to a by-now-well-settled framework that tracks, quite formulaically, the language of the Fifth and Fourteenth Amendments: Has the claimant been “deprived” of “liberty” or “property” without “due process of law”? The threshold question of whether a “deprivation” has occurred is conceptually interesting, but of relatively limited practical importance.<sup>9</sup> Far more critical is the next analytic step: Does

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8. 1 HOLMES-POLLOCK LETTERS 17 (Mark Howe ed. 1941).

9. After initially holding that negligent official conduct was sufficient, see *Parratt v. Taylor*, 451 U.S.

the loss involve an interest characterizable as "property" or "liberty"? The methodology for defining those interests effectively determines the scope of procedural due process protection available to the individual confronting administrative power.

The Constitution, the Court has insisted, does not itself create "property."<sup>10</sup> As explained in *Board of Regents v. Roth*,<sup>11</sup> the presence of a property interest depends upon the content of the sub-constitutional federal or state law governing the particular regulatory program. Specifically, this law must contain substantive standards that limit the discretion of the official decisionmaker. Such discretion-constraining criteria create a "legitimate claim of entitlement," which constitutes the "property" due process protects.<sup>12</sup>

Originally, only property interests were identified through entitlement analysis. The *Roth* Court conceptualized "liberty" very differently, adopting *Meyer v. Nebraska*'s broad vision of an open-ended set of fundamental rights rooted deep in natural law:

Without doubt, [liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. In a Constitution for a free people, there can be no doubt that the meaning of "liberty" must be broad indeed.<sup>13</sup>

Hence, in the early stages of constructing the modern doctrinal framework, "liberty" was understood to have an expansive, immanent substantive content, even though "property" was viewed as completely derivative of other law.

The Court still acknowledges that liberty interests can be grounded directly in the Constitution. Less certain, however, is its continued commitment to the *Meyer* vision of liberty as including *but not being limited to* interests explicitly protected in parts of the constitutional text outside the due process clauses themselves. The first signs of ambivalence appeared in two cases decided four

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527, 536-37 (1981), the Court now interprets "deprive" to require some intentional (or possibly reckless) abuse of power. See *Daniels v. Williams*, 474 U.S. 327, 330-32 (1986). In the "typical" administrative due process case, the harmful conduct—withdrawal of benefits or employment, or imposing some penalty—is unequivocally intentional, even though the complaint may be that the official decision resulted from careless information-gathering or processing.

In the less frequent cases in which the harm is attributed to an official's *failure* to act, the mental state requirement is further complicated by the Court's recent distinction between governmental action and inaction. See *Deshaney v. Winnebago County Dep't of Social Services*, 109 S. Ct. 998 (1989); David Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53.

10. See *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

11. 408 U.S. 564 (1972).

12. *Id.* at 577.

13. *Id.* at 572, quoting, in part, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

years after *Roth*. *Paul v. Davis* repudiated a long line of precedent that had recognized a *Meyeresque* liberty interest in reputation.<sup>14</sup> In *Paul*'s revisionist account, the constitutionally critical fact in the earlier cases was not that government had stigmatized an individual but rather that some other, non-reputational "right or status *previously recognized by state law* was distinctly altered or extinguished."<sup>15</sup> This invocation of what sounded suspiciously like entitlement reasoning was followed shortly by *Meachum v. Fano*.<sup>16</sup> *Meachum* explicitly used entitlement reasoning to determine whether the transfer of state prisoners to another penal institution implicated a liberty interest.<sup>17</sup> *Meachum* may simply have intended to expand the possible range of "liberty" to include entitlements created by sub-constitutional law. However, *Paul* loomed large, and the dissenters read *Meachum* as reining in *Meyer*'s naturalistic conception with the positivist tethers of entitlement.<sup>18</sup>

Whatever the original intent of *Meachum*, once entitlement analysis became available as a way to think about liberty as well as property interests, its power as an analytic framework was almost irresistible. After all, a substantial part of the constitutional content of liberty can be neatly accounted for in entitlement terms: What is the Bill of Rights but a set of standards, of the highest order, constraining the discretion of official decisionmakers? The fit is not so comfortable, however, for interests not explicitly protected in the constitutional text. Although it is not impossible to recast *Meyer* in entitlement terms—"liberty" in the due process clauses would be seen as itself a source of entitlement to marry, engage in the common occupations of life, acquire useful knowledge, etc.—entitlement's emphasis on locating a checklist of substantive standards limiting government action serves only to highlight the indeterminacy of the natural law/fundamental rights vision. And the Court has appeared increasingly uncomfortable invoking that vision. While it has not openly disavowed the naturalistic conception of *Meyer*, it repeatedly and conspicuously sidesteps opportunities to affirm, unambiguously, that "liberty" has significant immanent content independent of interests recognized by other law.<sup>19</sup>

As the methods for identifying "property" and "liberty" converge into entitlement analysis, the precise workings of that analysis have become critical, for they effectively determine the nature and scope of the due process guaran-

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14. 424 U.S. 693 (1976). *Roth* itself had acknowledged reputation as a protected interest; it had even collected cases demonstrating it as such. See 408 U.S. at 573.

15. 424 U.S. at 711 (emphasis added).

16. 427 U.S. 215 (1976).

17. See *id.* at 226-29.

18. *Id.* at 229-30 (Stevens, J., dissenting).

19. Even in the core area of interference with physical integrity, the Court now tends to link "liberty" to the terms of subconstitutional positive law. See, e.g., *Vitek v. Jones*, 445 U.S. 480, 488-93 (1980) (transfer of prisoner to mental hospital); *Washington v. Harper*, 110 S. Ct. 1028, 1036-37 (1990) (nonconsensual administration of psychotropic drugs to prisoner). In both cases, the Court first identifies in detail a state law liberty entitlement, then adds a cursory assurance that due process itself also generates a liberty interest.

tee. Standards that constrain the discretion of the official decisionmaker—the touchstone of entitlement—may be found in state or federal statutes, municipal ordinances, or the terms of agency regulations and contracts. Whether they can be grounded in anything short of *explicit, written* official promulgations is increasingly doubtful. Early on, a companion case to *Roth* held that entitlement could be found in the “unwritten common law”<sup>20</sup> of the agency, as proved by “the existence of rules *and understandings*, promulgated *and fostered* by state officials . . . .”<sup>21</sup> Later, however, *Paul v. Davis* refused to recognize the common law of defamation as a source of entitlement to reputation.<sup>22</sup> Then, *Meachum v. Fano* gave short shrift to a claim based on institutional practice. Although the majority admitted that prison transfer decisions typically hinge on official judgments about inmate conduct<sup>23</sup> (and conceded that this had been so in Fano’s case<sup>24</sup>), it found no entitlement because state statutes did not explicitly limit the transfer power to occasions of inmate misbehavior.<sup>25</sup> Subsequent institutional practice claims have fared similarly poorly. As in *Meachum*, the reason does not appear to be judicial disbelief that the plaintiffs accurately represented the reality of official practice, but rather unwillingness to accord constitutional significance to a course of agency conduct not formally codified in positive law.<sup>26</sup>

The constriction of the institutional practice branch of entitlement analysis has been matched by increasing restrictions on even those claims grounded in

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20. *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) (internal quotes omitted).

21. *Id.* at 602 (emphasis added) (remanded to determine whether standard met).

22. 424 U.S. at 708-10. Although agency common law and judicial common law are different, they share a defect crucial to the Court’s analysis: Each lacks the affirmative imprimatur of the majoritarian processes. *See infra* text accompanying notes 190-200.

23. 427 U.S. at 228.

24. *Id.* at 216-21 & nn.2-3. The plaintiffs had been transferred because of alleged participation in a riot.

25. *Id.* at 228.

26. *E.g.*, *Leis v. Flynt*, 439 U.S. 438, 442 (1979) (per curiam); *Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 465 (1981); *Kentucky Dep’t of Corrections v. Thompson*, 490 U.S.—, 104 L. Ed.2d 506, 522 (1989) (Marshall, J., dissenting).

At one point, a 5-4 per curiam opinion introduced a peculiar twist by asserting that institutional practice can be invoked to ground property *but not liberty* entitlements. *See Jago v. Van Curen*, 454 U.S. 14 (1981). This distinction, which the Court has not mentioned since, seems thoroughly unsound. In the first place, the difference between “liberty” and “property” entitlements is often elusive. For example, both employment and education have been labelled property interests, *see Roth*, 408 U.S. at 577; *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975), even though *Meyer* and other early substantive due process cases regarded both as aspects of liberty. *See Henry Monaghan, Of “Liberty” and “Property”*, 62 CORNELL L. REV. 405, 434-35 (1977). Even within the contemporary period, the Court has not been consistent, *compare Goss*, 419 U.S. at 573 (describing “good time credits” as property) with *Meachum*, 427 U.S. at 225-26 (describing same as liberty), which suggests that the classification was never thought to matter. More fundamentally, although it is superficially appealing to associate such contractual notions as implied promises and estoppel with “property” rather than “liberty,” the real question is what due process is supposed to be protecting. If entitlement analysis tries to safeguard the citizen’s reasonable expectations about official behavior, *see infra* text accompanying note 189, there is no reason why institutional practice should be relevant to defining property, but not liberty, interests. If (as now seems more likely) protection of reasonable reliance is not the moving force behind entitlement, *see infra* text accompanying notes 190-95, *Jago* is probably best understood as one step towards eliminating institutional practice claims across the board.

formal official promulgations. The issue here is the degree to which positive law must constrain official discretion before an entitlement will be recognized. Frequently, a regulatory statute will establish decisional criteria that are not determinate and self-executing; rather, their application requires an exercise of official judgment. In 1987, the Court explicitly considered whether such statutes might give rise to an entitlement, and six justices agreed that they could.<sup>27</sup> Justice O'Connor vehemently dissented, insisting that entitlement requires "particularized standards or criteria."<sup>28</sup> Joined by Justice Scalia and the Chief Justice, she argued that no protected interest exists unless "judicially manageable standards are available for judging how and when an agency should exercise its discretion."<sup>29</sup> In 1989, the Court moved significantly closer to this more restrictive view, announcing that entitlement requires "explicitly mandatory language in connection with the establishment of specific substantive predicates to limit discretion."<sup>30</sup> Regulations that contained "substantive predicates undoubtedly . . . intended to guide the [official's] discretion" were held insufficient where "the regulations are not worded in such a way that an inmate could reasonably expect to enforce them against prison officials."<sup>31</sup> Thus, the doctrine now apparently incorporates Justice O'Connor's theory that a protected interest exists only where positive law provides a basis for courts to compel the official to act or refrain from acting.<sup>32</sup>

The final significant aspect of entitlement analysis is its treatment of any procedural terms contained in positive law. The rule, simple at least in theory, is that such provisions are irrelevant. On the one hand, statutes or regulations that impose procedural requirements on official action cannot, by themselves, give rise to liberty or property interests.<sup>33</sup> On the other hand, neither can procedural provisions limit the dimensions of the entitlement. In other words, the question of *what* process is due is entirely separated from the question of *whether* process is due. The latter may (and in the case of property, must)

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27. *Board of Pardons v. Allen*, 482 U.S. 369, 375-81 (1987) (Discretion is inconsistent with entitlement only where decisionmaker "is simply not bound by standards set by the authority in question," such that he is, in effect, authorized to decide as he sees fit.).

28. *Id.* at 382 (dissenting op.).

29. *Id.* (citations omitted).

30. *Kentucky Dep't of Corrections v. Thompson*, 490 U.S.—, 104 L.Ed.2d 506, 516 (1989) (citations omitted).

31. *Id.* at 517-18.

32. On the critical question whether the terms of the particular statute or regulation represent mandatory decisional standards, ultimate interpretive authority rests with the courts of the relevant jurisdiction, see, e.g., *Olim v. Wakinekona*, 461 U.S. 238, 249-50 & n.10 (1983) (deferring to Hawaii Supreme Court's decision that state regulation does not operate substantively to constrain prison administrator's transfer power). *Accord* *Perry v. Sindermann*, 408 U.S. 593, 602 n.7 (1972). Thus, the state court retains effective control over the fate of due process claims through its power to set the meaning of the relevant positive law. Some have speculated that such rulings are subject to a requirement of "fair support." See, e.g., HART & WECHSLER'S *THE FEDERAL COURTS IN THE FEDERAL SYSTEM* 579 (3d ed. 1988) [hereinafter HART & WECHLER]. However, the Court thus far has shown no inclination to probe the reasonableness or predictability of the interpretation given state law, and has accepted constructions that were, to say the least, imaginative readings of the pertinent language. E.g., *Bishop v. Wood*, 426 U.S. 341 (1976) (discussed *infra* notes 194-95).

33. E.g., *Olim v. Wakinekona*, 461 U.S. at 250; *Bishop v. Wood*, 426 U.S. at 345-47.



depend entirely on sub-constitutional law; the former is purely a matter of constitutional analysis. Chief Justice Rehnquist has been the most vigorous opponent of this bifurcation, repeatedly urging the view that "where the grant of a substantive right is inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant . . . must take the bitter with the sweet."<sup>34</sup> The Court eventually rejected this position by an 8-1 margin,<sup>35</sup> but the issue is not as moribund as the lopsided vote implies. The justices have often disagreed on whether particular provisions should be regarded as substantive (and so, constitutionally relevant) or procedural (and so, constitutionally irrelevant),<sup>36</sup> thus perpetuating the debate under the guise of classification.

The final doctrinal question—what process is due?—is answered by employing a tripartite utilitarian balance set forth in *Mathews v. Eldridge*.<sup>37</sup> The private interest that will be affected by the official action and the risk of erroneous deprivation of this interest through the procedures currently used are offset against the government's interest in avoiding the burdens of affording additional process (which include the cost of undeserved but unrecoupable benefits paid while such process is being afforded). In theory, each procedure sought (oral presentation, opportunity to present witnesses, cross-examination, etc.) must be separately assessed. Timing questions (i.e., which elements of process, if any, must precede the deprivation) also are resolved through the balance.

Although framed in terms that invite quantitative analysis, the *Mathews* balance is rarely conducted with empirical evidence. Indeed, the Court has discouraged data such as agency reversal rates, opining that "[b]are statistics rarely provide a satisfactory measure of the fairness of a decision-making process."<sup>38</sup> Not surprisingly, the precise outcome of the balancing in any given case is virtually impossible to predict, although some general trends have emerged. The Court almost never accords a full adversary hearing prior to termination.<sup>39</sup> Typically, the process due is notice of the grounds for decision plus some sort of opportunity for response<sup>40</sup> prior to the deprivation, with something approaching a full evidentiary hearing available *after* the deprivation. All this process occurs at the administrative level. Although the Court

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34. *Arnett v. Kennedy*, 416 U.S. 134, 153-54 (1974) (plurality opinion).

35. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

36. Compare, for example, the various positions taken by Justices Powell, Blackmun and Stewart in *Arnett* with their respective positions in *Goss*.

37. 424 U.S. 319, 335 (1976).

38. *Id.* at 346. See also *id.* at 347.

39. *Id.* at 343 (announcing "the ordinary principle, established by our decisions, that something less than an evidentiary hearing is sufficient prior to adverse administrative action").

40. The opportunity for response may be quite informal, will not necessarily include the opportunity to offer corroboration, and may be written rather than oral.

has, on occasion, refused to order any administrative process on grounds that post-deprivation judicial process is available, those cases appear to be idiosyncratic.<sup>41</sup>

## II. CRITIQUES AND CRITIQUES OF CRITIQUES

*"It was a long time in the learning, that lesson:  
You cannot curse a part without damning the whole."*<sup>42</sup>

No aspect of contemporary due process doctrine has escaped criticism. Without doubt, though, the lion's share of disapproval has been reserved for entitlement analysis—and with good reason. Entitlement is the linchpin of procedural due process, most immediately defining the range of protected interests, but also indirectly shaping even such ostensibly separate inquiries as what process is due. To appreciate the dilemmas of the doctrine, here is where we must start.

The troubled history of entitlement analysis can best be understood as comprising two distinct (though related) questions: *where* will we look for protected interests? and *what* will we require those sources to contain? Part A, *The Positivist Trap*, discusses the first; Part B, *Inside the Positivist Trap*, tells of the second. Finally, to complete the story of contemporary due process jurisprudence, Part C, *Utilitarian Balancing*, moves beyond entitlement to recount the related discontent that is "what process is due?"

### A. *The Positivist Trap*

*COURT: "You don't expect us to just make these interests up,  
do you?"*<sup>43</sup>

When *Goldberg v. Kelly* afforded procedural due process protection to

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41. Some are distinguishable from the typical benefit or sanction decision by the fact that the harmful action was alleged to be negligent and hence not foreseeable by the agency. *E.g.*, *Parratt v. Taylor*, 451 U.S. 527 (1981). The subsequent holding that "deprivation" requires more than mere negligence, *see supra* note 9, rendered these cases doctrinal anachronisms. *Hudson v. Palmer*, 468 U.S. 517 (1984), holding post-deprivation tort remedies sufficient where a state employee maliciously and unauthorizedly effected a deprivation, is potentially more significant. However, the Court has recently explained *Hudson* as an instance in which the state was unable "to provide predeprivation process because of the random and unpredictable nature of the deprivation . . . ." *Zinermon v. Burch*, 110 S.Ct. 975, 987 (1990).

*Ingraham v. Wright*, 430 U.S. 651 (1977), which refused to require any process before school officials inflicted corporal punishment, is the other significant example of post hoc tort remedies constituting "due" process. This case was complicated by the fact that state law afforded teachers a good-faith-mistake privilege—although even a liberty interest in avoiding unreasonably mistaken corporal punishment would seem to merit the minimum process of predeprivation notice of reasons and opportunity to respond. Perhaps the best that can be said about *Ingraham* is that Court seems uncomfortable with it and has resisted defendants' efforts to extend it to other cases. *See, e.g.*, *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 19-22 (1978).

42. ALICE WALKER, *THE TEMPLE OF MY FAMILIAR* 198 (1989).

43. JERRY MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 148 (1985).

welfare benefits, it seemed the beginning of a brave new world. Due process, Justice Brennan's opinion assured us, had at last escaped the right/privilege distinction.<sup>44</sup> That assurance carried great symbolic significance. The right/privilege distinction had repeatedly thwarted the extension of due process to benefits, licenses, jobs and other advantageous relations with government. In its substantive aspect, it allowed legislatures to condition the establishment or continuance of such relationships on individual behavior that government otherwise could not compel.<sup>45</sup> In its procedural aspect, it permitted officials to deny or withdraw these relationships on the basis of reasons that had been ascertained through inadequate or unreliable process or, more extreme, to act for no articulated reason at all.<sup>46</sup> Catchphrase for a fairly intricate body of law, "the right/privilege distinction" stood for a fairly simple idea: The Constitution has nothing to say about how government conducts itself in relationships it is under no obligation to establish, even if those relationships are deeply important to the people involved. Unless the citizen can muster a legal basis for demanding the benefit, status or opportunity (that is, can assert a "right" to what the government offers), the only substantive or procedural constraints on official action are those which the legislature has chosen to impose.

The *Goldberg* world was new in unabashedly asserting that the Constitution mediates the intercourse between government and its people even when government is distributing the quintessential largess, welfare. It was brave in thus opening to constitutional exploration the broad expanse of the contemporary regulatory state. When, two years later, *Roth* emphatically stated that "the Court has fully and finally rejected the wooden distinction between 'rights' and 'privileges,'" <sup>47</sup> *Goldberg's* promise seemed confirmed. Due process had transcended the 19th century vision of a world privately ordered within the shelter of the common law, which government sporadically entered to jeopardize vested rights or dispense gratuitous privileges. It had, at last, arrived at a 20th century recognition that access to much of what people wanted or needed was created or controlled, to some degree, at some level, by government.

But *Roth* lied, or at least was profoundly self-deluded. Determined to banish even the rhetoric of privilege, *Goldberg* had insisted that welfare "benefits are a matter of statutory entitlement for persons qualified to receive

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44. 397 U.S. 254, 262 (1970).

45. Or, at least could not compel without significant burden of justification. The best example remains an opinion of Oliver Wendell Holmes, dismissing the claim of a police officer who had been fired for engaging in off-the-job political comment: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

46. E.g., *Bailey v. Richardson*, 182 F.2d 46 (D.C. Cir. 1950), *aff'd by an equally divided court*, 341 U.S. 918 (1951) (government employee dismissed for disloyalty without opportunity to know or respond to evidence against her).

47. 408 U.S. at 571.

them.”<sup>48</sup> *Roth* took this description, which had been intended to empower citizens standing before their government, and transformed it into a burden incumbent upon the individual who would claim due process. In so doing, *Roth* turned the new doctrine irresistibly back towards right/privilege. Although the vocabulary had changed—“It is a right?” became “Is it an entitlement?”—the methodology remained constant in two crucial respects. First, the applicability of constitutional protection depends upon a categorical assessment of the interest, rather than on the fact or effect of government interaction with the citizen. Second, this assessment hinges principally on the content of law outside the due process clause.<sup>49</sup>

The commentary quickly pointed out that entitlement analysis recreates the essence of the right/privilege distinction.<sup>50</sup> The objection here goes deeper than the Court’s apparent unawareness that *Roth* marched us back down the hill *Goldberg* had just marched us up. If the right/privilege distinction had offered spotty and uncertain protection for citizens otherwise at the mercy of how their government chose to treat them, entitlement analysis represented a positivism that was alarming in its implications. *Roth* held, seemingly without qualification, that property interests are not created by the Constitution; “[r]ather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . .”<sup>51</sup> Henry Monaghan then posed a hypothetical that has since haunted the commentary:

Suppose that a state motor vehicle statute invested automobiles with all the attributes of property as that term is generally understood, but also provided that no person who bought a car after the statute was passed would be deemed to have a “right to continued” ownership as against the state.<sup>52</sup>

Would an “owner” deprived of his automobile pursuant to this statute have an interest in the vehicle sufficient to trigger due process scrutiny? An earlier court, following the right/privilege distinction, surely would have thought

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48. 397 U.S. at 262 (citations omitted).

49. The right-privilege distinction looked principally to the common law. See Todd Rakoff, Brock v. Roadway Express, Inc., and the New Law of Regulatory Due Process, 1987 SUP. CT. REV. 157, 170; Rubin, *supra* note 5, at 1068-69. Entitlement’s disinclination to resort to the common law, see *supra* text accompanying notes 20-26, appears rooted in the Court’s concern with constitutionalizing large portions of state law. See *infra* text accompanying notes 190-200.

50. E.g., LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 697-98 (2d ed. 1988); Rubin, *supra* note 5, at 1067; Rodney Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982). That the Court has not gone the full distance, to incorporate Chief Justice Rehnquist’s “bitter with the sweet” reasoning, is roundly criticized as internally inconsistent. See *infra* text accompanying note 203.

51. 408 U.S. at 577.

52. Monaghan, *supra* note 26, at 440. Monaghan did not describe the hypothetical statute in any more detail, but assume that it contains no substantive criteria formally constraining the confiscation decision.

so.<sup>53</sup> Right/privilege analysis had posed no threat to traditional forms of wealth. Un-self-conscious in their methodology, earlier courts knew property when they saw it. The shortcomings of right/privilege as the gate-keeper for due process were felt when courts encountered interests—such as government employment, licenses, or social welfare benefits—that possessed substantial importance to individuals but had neither traditional common law status nor statutory protection. *Goldberg*, in a great levelling, promised those newer forms of wealth the same claim to constitutional protection as traditional forms had always enjoyed. But where *Goldberg* would have levelled up, entitlement analysis now threatened to level down. If *Roth* was serious in asserting that the existence and dimensions of property interests depend upon the terms of sub-constitutional law, then traditional as well as new property is no more than whatever the legislature decides it should be.<sup>54</sup> A contemporary court employing entitlement analysis would be hard-pressed to explain how automobile “owners,” under Monaghan’s hypothetical statute, have any interest to which due process protection could attach.

By rendering tenuous constitutional protection of interests whose protection we had always taken for granted, the unabashed positivism of entitlement analysis made manifest the worm that also lay (though perhaps better hidden) at the core of the right/privilege distinction: Due process protects people from being deprived, by their government, of only those things their government has chosen to allow them to keep. The problem is not positivism *per se*; neither is it, *per se*, the idea of a norm that binds the community only so far as the community chooses to be bound. A constitution can constitute positive law; a constitution can embody our choice to bind ourselves until we collectively choose no longer to be bound. Indeed, both of these ideas are elemental to our understanding of our Constitution. Rather, the problem is the form of positivism that looks—exclusively in the case of property, and increasingly in the case of liberty—to the provisions of sub-constitutional law. Precisely because we understand the essence of the Bill of Rights and 14th Amendment to be constraint on simple-majoritarian positive law, a doctrine that makes constitutional protection contingent upon the terms of such law is deeply disturbing if not actually, within our constitutional culture, incoherent.<sup>55</sup>

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53. Note that the question is not whether the owner would win on the merits. Depending on how the confiscation scheme was implemented, venerable doctrine involving “traditional” property could lead to a conclusion that no individualized process was due. Compare *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915) with *Londoner v. Denver*, 210 U.S. 373 (1908). But surely the analysis would not have been truncated at the outset on grounds that no protected interest was implicated.

54. Since entitlement analysis does not privilege common law over statutory law—indeed, it apparently gives common law less effect, see *supra* note 22 and accompanying text and *infra* note 191 and accompanying text—there would seem no question that a statutory redefinition of the dimensions of the interest would trump any common law understanding. Part of the elegance of the Monaghan hypothetical is that it makes any reliance argument very difficult.

55. To be sure, we do not fully understand the “rather mysterious process” by which “the people both constitut[e] themselves as sovereign and, by that same self-constitutive act, self-impos[e] substantive limits on the reach of their own sovereignty.” Frank Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1326-27 (1987). See, e.g., Jonathan Macey, *Competing Economic*

Once the problem is thus identified, the remedy seems obvious. The phrase "life, liberty, or property" *must* possess intrinsic meaning that is not dependent on positive law.<sup>56</sup> Entitlement analysis must be abandoned, as fundamentally misguided, in favor of a doctrine that acknowledges a robust constitutional content to those terms.

This solution is appealing, for it accords with our deepest intuitions not only about our Constitution and its relation to normal politics in general, but also about the particular concepts involved. The beauty of the Monaghan automobile hypothetical is that it catches even us, a sophisticated audience of legal professionals, unawares. In the moment before our 20th century intellectual skepticism slips back into place to remind us that *we* know that property is "simply a label for whatever 'bundle of sticks' the individual has been granted,"<sup>57</sup> most of us have received a powerful instinctive signal that something is wrong. As C.B. MacPherson reminds us: "Property is not thought to be a right because it is an enforceable claim: it is an enforceable claim because it is thought to be a human right."<sup>58</sup> Whether we ultimately deal with the Monaghan hypothetical by attempting to clothe that first instinct with reason, or by attempting to reason instinct away, few of us are prepared simply to accept the statute as the definitive word on what the automobile owner "owns."<sup>59</sup> With respect to liberty, our instinctive resistance to positivism is even greater. When Justice Stevens un-self-consciously speaks in the voice of natural rights, many of us privately confess our sympathies: "[L]aw is essential to the exercise and enjoyment of individual liberty in a complex society. But it is not the source of liberty, and surely not the exclusive source."<sup>60</sup>

### 1. *Looking to Grand Theory*

However, the solution that appears so simple and sensible is revealed, almost immediately, to be fraught with difficulty. What should we understand to be the constitutional content of "property"? "[A]ny institution of property

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*Views of the Constitution*, 56 GEO. WASH. L. REV. 50 (1987); Bruce Ackerman, *The Storrs Lectures*, 93 YALE L.J. 1013 (1984) (both hypothesizing dynamics that distinguish constitution-making from "normal politics"). But, as with any article of faith, we know it to be so even if we cannot explain it.

56. I am using "positive law" in the sense in which the phrase is conventionally used in the procedural due process commentary, that is, to refer to law other than the Constitution itself.

57. Rubin, *supra* note 5, at 1086.

58. C.B. MacPherson, *The Meaning of Property*, in PROPERTY: MAINSTREAM AND CRITICAL POSITIONS 11 (C.B. MacPherson ed. 1978).

59. Discussions of the hypothetical include Peter Simon, *Liberty and Property in the Supreme Court: A Defense of Roth and Perry*, 71 CALIF. L. REV. 146, 182-84 (1983); Timothy Terrell, "Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis, 70 GEO. L.J. 861, 896-97 & n.201 (1982). Even Peter Simon, one of the very few commentators who applauds entitlement analysis, does not accept pure positivism. *See supra* at 184 ("The Court might conceivably find private ownership of automobiles so important that a statute like this, which does not treat the automobiles as property, is unconstitutional . . .").

60. *Meachum*, 427 U.S. at 230 (Stevens, J., dissenting).

requires a justifying theory."<sup>61</sup> Yet, the spectrum of possible justifications is vast, encompassing labor/natural rights theories,<sup>62</sup> personality theories,<sup>63</sup> and utility theories,<sup>64</sup> theories in which property is constitutive of the political order<sup>65</sup> and theories in which property is extra- (even anti-) political,<sup>66</sup> theories that embody an egalitarian presumption and theories that embody a libertarian presumption.<sup>67</sup> Even if choice among these multifarious theories were unnecessary—if, for example, history demanded that the *constitutional* meaning of property be derived from a labor/natural rights justification in the Lockean tradition<sup>68</sup>—the difficulties would only have begun, for theory must then be applied to sort through the plethora of interests now seeking due process protection. A Lockean labor theory might exclude from the category of "property" most of the governmental largess of the modern regulatory state. Or, as Edward Rubin has suggested, it might yield some surprising inclusions and exclusions.<sup>69</sup> Metamorphosed into Robert Nozick's "justice in holdings," Lockean theory appears to provide no purchase for dealing with the regulatory state short of wholesale dismantling.<sup>70</sup> But others, arguing from Locke, have found basis for fairly robust claims to that portion of the common wealth required to satisfy important needs.<sup>71</sup>

There is little cause for optimism that any of the other "grand theories" of property would prove more tractable in identifying which of the multitude of advantageous relations with modern government are comprised in the "property" of the Fifth and Fourteenth Amendments. And, despite our first flush of natural law conviction that "liberty" will be easier, it is not. Once we get beyond the familiar terrain of the Bill of Rights, the way is largely uncharted. Immediately, there looms the great divide between "negative liberty" and

61. MacPherson, *supra* note 58, at 11.

62. E.g., JOHN LOCKE, *THE SECOND TREATISE OF CIVIL GOVERNMENT* paras. 25-51; ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 149-160 (1974).

63. E.g., G.F.W. HEGEL, *PHILOSOPHY OF RIGHT* secs. 41-71 (T. Knox trans. 1976); Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982).

64. E.g., DAVID HUME, *A TREATISE OF HUMAN NATURE* 484-516 (L. Selbey-Bigge ed. 2d ed. 1978); JEREMY BENTHAM, *THE THEORY OF LEGISLATION*, 1-2, 68-120 (Bombay 1975); RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* ch. 3 (2d ed. 1977).

65. E.g., James Harrington, *The Commonwealth of Oceana*, in *THE POLITICAL WORKS OF JAMES HARRINGTON* 157-58, 163-65 (J. Pocock ed. 1977); James Harrington, *The Prerogative of Popular Government*, in *id.* at 394, 404-12, 458-73. See DREW MCCOY, *THE ELUSIVE REPUBLIC: POLITICAL ECONOMY IN JEFFERSONIAN AMERICA* 60-62, 67-69, 126-27 (1980); Michelman, *supra* note 55, at 1329.

66. E.g., R. NOZICK, *supra* note 62, ch. 7 *passim*, esp. 167-74.

67. See Thomas Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 *STAN. L. REV.* 877, 877-78 (1976).

68. Of course, there is no way to avoid choice. Even if the historical triumph of Lockean thought were conclusively established—which (even putting aside the 100 year gap between the adoption of the two due process clauses) it is not, see STEVEN WATTS, *THE REPUBLIC REBORN* (1987); D. MCCOY, *supra* note 65—the proposition that history should play the dominant role in constitutional interpretation is hardly uncontroversial.

69. Rubin, *supra* note 5, at 1090 n.239 (explaining that AFDC benefits might be "property" while business license granted to owner of capital might not be).

70. R. NOZICK, *supra* note 62, at Preface, 149-53.

71. E.g., JAMES TULLY, *A DISCOURSE ON PROPERTY* (1980); G.A. Cohen, *Self-Ownership, World Ownership and Equality*, in *JUSTICE AND EQUALITY HERE AND NOW* (F. Lucash ed. 1986).

"positive liberty."<sup>72</sup> The choice here may not appear so difficult. In our legal tradition, negative liberty seems reassuringly familiar; indeed, in this region lie well-known landmarks: "the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, to establish a home and bring up children . . . ."<sup>73</sup> Yet it takes little imagination to realize that, today, the ability to enjoy even these archetypical freedoms is not assured by merely "the right, as against the Government, to be let alone."<sup>74</sup> The licenses required to marry and to enter many occupations, the permits and certificates needed to build a home, the policies and procedures constituting the public education system are but the superficial indicia of government involvement. There is, more fundamentally, the matrix of health, safety, consumer protection, environmental, and other social welfare regulations in which our personal and professional transactions are embedded, the economic programs which enable us to acquire a home or an education, the financial and social services that support our efforts to bear and raise healthy, knowledgeable, well-rounded children—all bearing witness that the liberty "generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men"<sup>75</sup> now depends upon government's active cooperation and assistance. To live, with any appreciable degree of awareness, in our complex regulatory society is to be wary of a purely negative conception of liberty. And even this wariness would take into account only the privileged position of the healthy, able-bodied, pre-retirement age, two-parent, white family able to generate an income comfortably exceeding the poverty level. For the significant portion of our population who are poor, elderly, children, persons of color, physically or mentally challenged, or otherwise living under conditions of disadvantage and oppression, the high plain of negative liberty is not merely bleak and inhospitable, it is openly hostile and even life-threatening.

By contrast, positive liberty is a fertile land, laden with promise. From simple seeds spring richly-branched conceptions, such as Laurence Tribe's articulation of the interests entailed in freedom of speech: "One must be able to express oneself to protest the violation of other rights, but to express oneself one needs at least a decent level of nourishment, shelter, clothing, medical care, and education. To have these things, one needs either employment or income support."<sup>76</sup> But the very generosity of the positive theory of liberty is the genesis of problems. In a society that has evolved a plentiful standard of living through the coordination and assistance of government, positive liberty has no readily discernible stopping point.

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72. See generally ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* xxxvii-lxii, 122-72 (1969).

73. *Meyer*, 262 U.S. at 399.

74. The phrase originally comes from Brandeis' dissent in *Olmstead v. United States*, 277 U.S. 438, 478 (1928).

75. *Meyer*, 262 U.S. at 399.

76. L. TRIBE, *supra* note 50, at 778.



The effort to give meaningful intrinsic content to "liberty" is thus caught in the same dilemma as the attempt to unsubstantiate "property": The available theories yield a collection of interests that is either inadequate or indeterminate.<sup>77</sup> That both undertakings should end in a common quandary is not surprising. A powerful element of our political philosophical tradition has been that liberty and property are interdependent.<sup>78</sup> At least for us, to identify the one may be, inescapably, to reveal the other. A sense of this interdependence may have inspired the alternative to entitlement theory proposed by Henry Monaghan and John Hart Ely. "Life, liberty, or property," they argue, should not be parsed as discrete categories, to one of which any contending interest must conform. Rather, the phrase should be understood as a unit that embraces "every interest valued by sensible persons."<sup>79</sup> This unitary "importance theory" has the virtue of premitting the exercise of classifying interests in favor of a direct focus on the meaning of the interchange with government to the individual situated in a particular cultural context.<sup>80</sup> But this formulation—however promising as a new starting point—will not, without more, significantly advance the inquiry. The recognition of "value" or "importance" can take place only within some larger account of human nature and the human community, the appropriate relationship between a people and their government, and the role of law in defining and facilitating these things—in sum, the same sort of account that is central to a justification of property or a theory of liberty. The unitary "importance theory" puts us more immediately in touch with these questions, but it cannot obviate the need to make choices about how we will resolve them.

To be sure, deliberating upon and reaching a resolution of these issues would seem to be one of the most compelling tasks for a people to undertake. Whether the occasion be crafting a grand theory of "property" or "liberty," or establishing the criteria by which we will assess the "importance" of interests, it is a task of defining and realizing our society's identity. The sticking point comes when a judiciary attempts to undertake this task in the context of constitutional interpretation. As Colin Diver puts it, "the utterance

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77. Even negative liberty is not so definitive as to make up for in determinateness what it lacks in reach. Consider the problems in defining the scope of legitimately-initiated custodial relationships with government, such as the questions of inter-prison transfers in *Meachum* or *Olim*, solitary confinement in *Jago*, transfer to a psychiatric facility in *Vitek*, or nonconsensual drug treatment in *Harper*. Surely conviction cannot extinguish all rights to physical and psychiatric autonomy.

78. See, e.g., C. Edwin Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986); Charles Reich, *The New Property*, 73 YALE L.J. 733, 771-74 (1964).

79. The formulation is Monaghan's. See Henry Monaghan, *The Burger Court and "Our Federalism"*, 43 LAW & CONTEMP. PROBS. 39, 49 (Summer 1980). See also Monaghan, *supra* note 26, at 406-09 (inter alia, "every individual 'interest' worth talking about"). Ely's version is that "the government [can't] seriously hurt you without due process of law." JOHN ELY, *DEMOCRACY AND DISTRUST* 19 (1980). To the extent that *Goldberg* can be said to embody a theory of protected interests, this appears to be it. See 397 U.S. at 262-263.

80. I am assuming here that "importance theory" is meant as something more than a vehicle for screening out potential plaintiffs with no personal stake. Although the question may be closer for Ely, as I read Monaghan, "importance" is not proposed merely as a variant standing requirement.

of two words—*Lochner* and *Wade*—is usually enough to stop this idea in its tracks.”<sup>81</sup> The *Lochner* objection has two distinct, though related, components.

The first challenges the legitimacy of a process in which fundamental decisions about who we are and what we value would be made by persons not elected by and unanswerable to the people. The flight from entitlement analysis—a journey begun so that the individual might not be at the mercy of the majoritarian process—is, by common reckoning, a grotesque failure if it ends in putting the majoritarian process at the mercy of the judiciary.<sup>82</sup> Our anxiety that this might indeed be the outcome of attempting a robust substantive conception of “liberty” or “property” or “importance” is heightened by the disturbing propensity of those who advocate such an approach to apply their particular conception to generate results that are highly debatable.<sup>83</sup> This anxiety in turn produces valiant attempts to cabin the judicial role without abandoning due process to the whim of positive law—such as Mark Tushnet’s proposal that the Court give content to liberty and property by looking to the well-settled opinions of respected professional organizations.<sup>84</sup> But we have no real or abiding faith that such attempts can succeed. Cut loose from any mooring in positive law, we suspect that due process adjudication would “be adrift in a stormy sea of ‘natural’ or ‘fundamental’ rights claims with no navigational aids beyond the imagination of the justices.”<sup>85</sup> And “[i]n a system which treats politically unaccountable power as presumptively illegitimate unless constrained by binding principle,”<sup>86</sup> that prospect is so disturbing that entitlement analysis begins to appear a sheep in wolf’s clothing. Perhaps, what seemed judicial abdication of constitutional responsibility is actually a seemingly judicial modesty; perhaps, what appeared to be a Court acquiescing in the tyranny of the majority is really a Court properly apprehending the will

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81. Colin Diver, *The Wrath of Roth*, 94 YALE L.J. 1529, 1542 (1985). *Lochner v. New York*, 198 U.S. 45 (1905), invalidated a law prescribing maximum hours for bakery workers as an illegitimate interference with freedom of contract. *Roe v. Wade*, 410 U.S. 113 (1973), invalidated restrictive abortion statutes as unduly trenching on a right of privacy, which included decisions about whether to terminate pregnancy.

82. See, e.g., Stephen Williams, *Liberty and Property: The Problem of Government Benefits*, 12 J. LEGAL STUD. 1, 16 (1983) (“the effort to stuff liberty full of every good thing, like a Christmas stocking, is little more than a counsel to the courts to assume the role of a Council of Revision”).

83. For example, after proposing that “liberty . . . should be read to embrace . . . any governmental conduct which so invades a decent respect for a person’s personal integrity that, if not fairly justified, the result would outrage public sensibility,” Henry Monaghan applies this standard to suggest that the plaintiff in *Paul v. Davis* (which has been the object of general criticism for its refusal to find any protected interest) “arguably did not state a prima facie case. . . . [A] case can be made for the proposition that it does not violate fundamental traditions of our law for the police to notify businesses during the Christmas season that a person is suspected of being an active shoplifter.” Monaghan, *supra* note 26, at 433-34 (citations omitted, emphasis supplied).

84. Mark Tushnet, *The Newer Property: Suggestion for the Revival of Substantive Due Process*, 1975 SUP. CT. REV. 261, 279-80.

85. Jerry Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433, 438 (1987).

86. Laurence Tribe, *Structural Due Process*, 10 HARV. C.R.-C.L. L. REV. 269, 292 (1975) (citations omitted).

of the people expressed through their representatives.

The second component of the *Lochner* objection represents a dilemma of comparable magnitude. One of the most troubling aspects of entitlement doctrine is its implications for takings analysis and substantive due process. Deprivation of "property" appears to be the constitutional trigger not only for government's responsibility to afford procedure but also for its duties to pay just compensation and to provide at least a rational justification for its actions. If property is purely the creature of positive law, Monaghan's hypothetical statute would appear to truncate not only claims for process but also these other, substantive, claims as well.<sup>87</sup> Entitlement analysis thus threatens to be even more grossly underprotective of individual interests than the focus on process first suggests. And yet, giving constitutional content to liberty and property in the service of procedural due process threatens to be grossly overprotective. *Lochner* casts long shadows. No matter how often we are reassured by highly respected voices that it need not be so,<sup>88</sup> we perceive behind attempts to secure property and liberty the dim outlines of a straight-jacket on progressive social change.<sup>89</sup> In few areas of constitutional law do we confront as clearly the difficulty of reconciling the capacity for growth and change implicit in our commitment to self-government with the stasis entailed in our commitment to self-restraint.

## 2. Looking to History—And History Modified

Still, one might insist, this act of reconciliation is an inescapable part of the Bill of Rights as we understand it, and the most resonant component of the *Lochner* objection appears to be the fear that the precise content of "liberty" and "property" would be defined by the preferences of five non-elected justices.<sup>90</sup> One way to minimize the danger of constitutionalizing "the judges' own notions of justice"<sup>91</sup> without abandoning due process to positivism is to cleave to history: The due process clauses embody not a grand theory of liberty or property but rather a discrete, historically recoverable set of interests expressed by the framers through those terms.<sup>92</sup> "Property" would include

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87. See, e.g., Monaghan, *supra* note 26, at 421.

88. E.g., *id.* at 432-33; Tushnet, *supra* note 84, at 277-79.

89. Indeed, the Reich article that encouraged *Goldberg* to extend *procedural* due process to the area of government benefits, see *infra* text accompanying note 103, was prompted by the failure of a *substantive* due process and takings attack on a Social Security Act amendment which prospectively altered the old-age benefits payable to a particular class of recipients. See *Flemming v. Nestor*, 363 U.S. 603 (1960).

Since we tend to associate *Lochner* with an obsession with private property, it is worth recalling that much of the substantive due process expansion in the late-nineteenth and early-twentieth century occurred under the rubric of "liberty" not "property." See Monaghan, *supra* note 26, at 411-13.

90. Ely traces this fear to "our ordinary notion of how law works: if your job is to enforce the Constitution then the Constitution is what you should be enforcing, not whatever may happen to strike you as a good idea at the time." J. ELY, *supra* note 79, at 12.

91. Frank Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 91.

92. See, e.g., *id.*; Williams, *supra* note 82, at 19-21.

"estates in fee and . . . a motley collection of additional interests (leases, estates) that made up the bulk of private wealth,"<sup>93</sup> as well, presumably, as tangible personalty, to make up a group denominated "traditional" or "ordinary" or "classical" property.<sup>94</sup> As these adjectives suggest, the constitutional category would track the comfortably familiar: It would legally vindicate the intuition that automobiles are property no matter what Monaghan's hypothetical statute says. Indeed, the promise of securing what we "know" to be property and liberty is felt as one of the great rewards of following in the footsteps of the framers. Proponents of a strict historical approach point out that *Goldberg's* attempt to enfold new interests in the same mantle which protected traditional ones so strained the constitutional fabric that all interests were left with only the threadbare protection of entitlement. Better to afford real protection to only certain, core interests than pseudo-protection to all.<sup>95</sup>

But the protection afforded by history also proves to be thin. "Traditional property" might encompass my automobile, but what about the inspection and registration certificates and the driver's license without which I may not travel on the public highways? To resolve these questions, I might turn hopefully to "liberty," but what lies within traditional liberty is an unpleasant surprise. The original understanding appears to have encompassed merely the freedom from physical restraint.<sup>96</sup> So meager does this notion of liberty appear to inhabitants of the contemporary regulatory state that only the most stout-hearted originalists can abide by it.<sup>97</sup>

As an alternative, Stephen Williams has proposed that "liberty" be understood to include "the interests entitled to due process protection as of 1925."<sup>98</sup> Liberty thus would encompass a collection of interests recognized by the Court beginning in 1897,<sup>99</sup> such as occupational liberty, the freedom of parents to control their children's education and, of course, freedom of contract. This expansion of classical liberty is justified, Williams argues, because "[t]he family resemblance between these interests and freedom from incarceration seems clear enough . . . ."<sup>100</sup> Without doubt, the pressure to expand liberty beyond the classic freedom from physical restraint is great—but so is the price of surrender. The high ground of legitimacy claimed by originalism affords but little compass. To leave the sacred precinct of what the framers understood and consented to is to join the ranks of the fallen angels. By stepping off the narrow path of historically determinate meaning and judicial restraint, Wil-

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93. Easterbrook, *supra* note 91, at 97.

94. *E.g.*, Williams, *supra* note 82, at 11-12.

95. *See, e.g., id.* at 13.

96. *See* Easterbrook, *supra* note 91, at 97; Williams, *supra* note 82, at 20; Monaghan, *supra* note 26, at 411.

97. Frank Easterbrook is the most notable example. His originalism in this area goes to lengths that virtually no one else is prepared to contemplate. *See* Easterbrook, *supra* note 91 (Except in limited cases, "due" process should be whatever legislature says it is.).

98. Williams, *supra* note 82, at 21.

99. *See* *Allgeyer v. Louisiana*, 165 U.S. 578, 588-90.

100. Williams, *supra* note 82, at 20.

liams' solution forfeited all claim to whatever justificatory power strict interpretivism possesses.

### 3. *Looking to Analogy*

Of course, this observation need not mean that no justification of Williams' proposal is possible. Indeed, his argument that restraints on the ability to contract, to pursue an occupation, and to educate one's children are *sufficiently like* restraints on one's person to be included within "liberty" represents another familiar method of determining constitutional meaning—a method that might be called analogical interpretivism.<sup>101</sup> In this approach, "the job of the person interpreting the provision . . . is to identify the *sorts of evils* against which the provision was directed and to move against their contemporary counterparts."<sup>102</sup> As a methodology for giving constitutional content to "liberty" and "property," analogical interpretivism occupies a pragmatic middle ground between the generality of grand theory and the particularity of a historically closed set of interests. It begins with the historical set, but eludes the grasp of the dead hand by distilling from those interests some essential or common elements that can be seen to transcend the limits of history. This process of distillation must include reference to the kind of normative considerations that constitute theoretical systems, but demonstrates an appealing humility by disavowing the comprehensiveness and abstract self-sufficiency of full-blown theory.

Analogical interpretivism is no stranger to due process. It undergirds Charles Reich's early and influential article, "The New Property."<sup>103</sup> Property, Reich argued, has always been the secure base from which Americans assert their individuality and claim their freedom; it draws the magic circle between public and private, maintaining independence, dignity and pluralism by creating a "small but sovereign island"<sup>104</sup> within the bounds of which the majority has to yield to the individual. In this way, "property" constitutes the indispensable condition of "liberty."<sup>105</sup> Liberty is the preservation of the individual from the tyranny of the collective, the freedom of each to exist as an autonomous being, uncoerced (except as necessary for the maintenance of societal order) by the majority's sentiments of appropriate or reasonable behavior.<sup>106</sup> Thus, taking the first critical step of analogical interpretivism—distilling that element or quality of the historical collection of interests that can then be carried forward to assess contemporary interests—Reich broadly identified "property" with individual security and "liberty" with individual

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101. I am indebted to my colleague David Williams for this descriptive phrase.

102. J. ELY, *supra* note 79, at 13.

103. Reich, *supra* note 78.

104. *Id.* at 774.

105. *Id.* at 771-74.

106. *Id.* at 771.

independence. While this reading was not uncontroverted,<sup>107</sup> it was thoroughly familiar and widely accepted.<sup>108</sup> Where later analogical interpretivists such as Williams sharply part company with Reich is in the next step: applying this reading to classify interests that today claim due process protection.

Reich observed that, for many citizens, government benefits, services, jobs, contracts, and licenses have come to take the place of traditional forms of wealth. Security, independence, and individuality itself could be preserved, he argued, only by affording these beneficial relations with government the same legal protections that traditional property and liberty receive.<sup>109</sup> But this reasoning, Williams pointed out, is at best hopelessly romantic and at worst positively illogical.<sup>110</sup> Those who have become dependent upon government cannot be saved through the very instrument of their dependency.<sup>111</sup> The only hope of preserving a vital individualism in the welfare state is to concentrate constitutional protection on those who retain some base for meaningful independence from government—that is, those who hold traditional property and thus fruitfully can exercise liberty. That due process thus fortifies only those already possessed of strength should come as no surprise: “Protection of property seems inescapably more likely to protect the propertied than the non-propertied; protection of liberty . . . is likely to advantage primarily those with the personal capacity to use their liberty.”<sup>112</sup>

Cast in such raw, uncompromising terms, Williams’ response to Reich is easy to dismiss as a particularly offensive version of laissez-faire libertarianism. But beneath the Malthusian rhetoric lies a subtly powerful point. To call upon the state’s legal regime to protect the individual from the state itself is always a delicate and chancy undertaking. Due process might accomplish this difficult feat with respect to traditional property and liberty because, although we recognize the role of law in defining and protecting these interests, we resist, on some very fundamental level, the idea that law literally *creates* them. The distance we perceive between these interests and government is what enables us to regard traditional property and liberty as bastions of individualism; it is the space on which we stand to make a credible demand that government, through its courts, protect us from itself. By contrast, many of the valuables dispensed by the regulatory state *do* seem to be the creature of

107. See, e.g., Monaghan, *supra* note 26, at 414-16 (historical criticism of this broad conception of “liberty”).

108. See, e.g., Williams, *supra* note 82, at 11. Cf. Terrell, *supra* note 59, at 903 n.215 (sharing with Reich “a common concern with individual autonomy”); Robert Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60, 78 (1976) (discussing “the respect for individual autonomy that is at the foundation of procedural due process”).

109. Reich, *supra* note 78, at 733, 778-87. Reich specifically discussed procedural due process, *id.* at 783-85, but it played only a minor part in his sweeping proposal.

110. Williams, *supra* note 82, at 11-13.

111. See *id.* at 16 (Due process protection “could not transform government dependents into bulwarks against it . . . . [J]udicial creation of procedural niceties could not secure genuine independence for individuals who were substantively dependent upon government.”).

112. *Id.* at 27 n.86.

government, made available to individual citizens purely because the collective will of the citizenry, expressed through its representatives, would have it so. Coincidental with the positive law that creates them, these interests offer little moral or political purchase for the sort of self-disciplining exercise due process entails, in which government responds to the individual's demands for distance between himself and the collective. A political system that recognizes simultaneously the *essentialness* and the *unlikeliness* of such demands being honored might well allow them to be made in only the strongest of cases. What first seems benighted social Darwinism may be in fact prudent constitutional economy.

Thus, Williams' analogical interpretivist theory—in which the group of protected interests extends as far as, but no further than, the freedoms of family ordering, occupation, and contract which (with traditional property and liberty) represent spheres of individual autonomy—begins to seem an astute compromise between the anachronistic spartanism of literal historical meaning and the unworkable prodigality of Reich's vision. But at this point, Williams himself encounters two major difficulties. The first can be seen by returning to the ubiquitous automobile hypothetical. Traditional property protects my car, but even extending "liberty" to encompass the classic negative liberties will not reach the certificates and licenses I require to make meaningful use of it. Unless my access to those items is protected from government arbitrariness, any independence and security that arises from owning my car is chimerical.<sup>113</sup> Williams meets this first, and most immediate, difficulty by proposing a sort of penumbra around the core protected interests: In addition to policing direct deprivations of traditional property and negative liberty, due process will intervene whenever "denial of the government benefit *burdens* traditional property or negative liberty."<sup>114</sup> On the "burden" theory, at least vehicle registration and inspection certificates, and possibly even my driver's license, would be recognized as constitutionally-protected interests.

This seemingly modest, common-sensical extension of "liberty" and "property" proves, however, to possess a surprising, kudzu-like vigor. Its power springs from the elementary fact that most benefits government offers citizens are simply reincarnations of burdens on citizens' liberty and property. The point here is not a Nozickian attack on the legitimacy of those burdens in the first instance. Rather, the point is one of identity: The people who seek licenses, benefits, jobs, and other valuables from government are the same people who pay for those things by giving up substantial portions of their property and liberty.<sup>115</sup> To take account of this, Williams reasoned, due

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113. This, of course, is the same problem that grand theory encounters in choosing between a negative and a positive conception of liberty. See *supra* text accompanying notes 72-77.

114. Williams, *supra* note 82, at 22 (emphasis added).

115. As Williams points out, "Everyone pays taxes. Even a person who at any given moment derives his entire income from government transfers is likely either to have paid taxes out of nontransfer income in the past or to do so in the future." *Id.* at 24-25.

process must also protect both (1) those benefits for which, if the individual tried to use a private substitute to escape government arbitrariness, he would have to, in effect, pay twice; and (2) those benefits for which there is effectively no private substitute because citizen-subsidized public intervention has substantially foreclosed private alternatives.<sup>116</sup>

Here, then, is Williams' second difficulty. Despite his careful historical and analogical reasoning, the whole of the welfare state seems to be slipping into liberty and property through the back door of "burden." He attempts to stem this infiltration by narrowly applying his own pay-twice and private-preclusion tests.<sup>117</sup> But the damage is done. Having begun with the meticulously pedigreed concepts of "liberty" as those interests which constitute individual independence from the collective, and "property" as those which represent individual security from government, he has arrived at two definitional standards—pay twice and private preclusion—that have only the most attenuated conceptual connection to the original categories. Consequently, the specific interests that pass even Williams' own stringent application of those tests—public education,<sup>118</sup> social security benefits<sup>119</sup> and welfare<sup>120</sup>—bear little resemblance to the traditional property and liberty family. Indeed, they have a suspiciously Reichian, positive liberty cast. This internal instability is most clearly revealed when welfare—the epitome of individual dependence on government, the antithesis of the right to be let alone—can emerge from Williams' analysis wearing the name "property."

#### 4. Looking to Function

It thus appears that neither grand theory, nor history, nor history-embraced-yet-transcended-through-analogy can meet all the necessary conditions of a successful attempt to give content to "property" and "liberty": a content that is rich enough (comprehending the new promises and perils of the regulatory state), but not too rich (constitutionalizing all of administrative government and resurrecting *Lochner*), attained through a methodology sufficiently principled

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116. *Id.* at 22.

117. For example, he would limit pay twice reasoning to benefits, such as education, financed through an earmarked tax. *Id.* at 23-27. But this limitation ultimately proves unsatisfying. Attempts actually to trace tax contributions are fraught with difficulty. Even the quintessential federal earmarked-tax program—social security retirement benefits—is a quid-pro-quo system in only the loosest sense. See William Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431, 1444-45, 1458-59 (1986). More fundamentally, focusing on earmarking loses substance in a meaningless pursuit of form. The reality that Williams' "burden analysis" attempts to capture is not that individuals "earn" due process protection when their traditional property is perceptibly transmuted into a particular benefit on a dollar-for-dollar basis, but rather that the valuables government dispenses do not materialize out of thin air. The link between a benefit such as public education and "the concomitant impact upon property or well-recognized liberties," Williams, *supra* note 82, at 22, is no more or less real if the program is funded out of general revenues than if it is financed through an earmarked tax.

118. Williams, *supra* note 82, at 21-27 (on both pay twice and private preclusion theories).

119. *Id.* at 37-38 (on pay twice theory).

120. *Id.* at 36-37 (on private preclusion theory).



and determinate to be regarded as a legitimate judicial exercise in constitutional interpretation. Yet the pressure to free due process from the jaws of entitlement is so strong that it impels still another strategy for escaping the positivist trap, a strategy that might broadly be called the functionalist approach.

Functionalism's central methodological metaphor is stepping back several paces, so as to see the forest rather than the trees. It encompasses a number of proposals that differ, sometimes radically, in their elements but that share a common determination to discover not the constitutional meaning of "property" or "liberty," but rather the constitutional function of due process.

One of the earliest proponents of functionalism was William Van Alstyne. We don't *really*, he observed, regard government jobs or benefits as "property."<sup>121</sup> When we invoke the term in these cases, "we are almost surely saying it only instrumentally, . . . because we see no other constitutional handle on the problem."<sup>122</sup> What really bothers us is that the individual was not treated fairly by government. "And surely there must be a way to carry forward the simplicity of that concern by more direct means, without vindicating property in all its meanness, as was done in *Lochner*."<sup>123</sup> Van Alstyne's initial solution was as simple and direct as one could imagine: Due process is a self-actuating right to be free of arbitrary government action, a right that "comes in from the outside to build in the assurance provided by fair procedures" that government decisions are in fact supportable.<sup>124</sup>

If this straightforward solution looked too good to be true, it was. Van Alstyne himself soon acknowledged a seemingly insurmountable textual objection. His interpretation in effect rewrote the Fourteenth Amendment to read: "No State shall . . . deprive any person of life, liberty, property, *or of due process of law*, without due process of law."<sup>125</sup> So he proposed a variation, in which "liberty" includes the "substantive element" of freedom from arbitrary adjudicative procedures: "[T]he ideas of liberty and of substantive due process may easily accommodate a view that government may not adjudicate the claims of individuals by unreliable means."<sup>126</sup> He had not, however, evaded the textualist critique. The revision presented the same problem in a slightly different package: "Nor shall any State deprive any person of life, liberty (*including the freedom from arbitrary adjudicative procedures*), or property without due process of law."<sup>127</sup> Indeed, the attempt to locate the right to fair process within "liberty" was an even greater textual failure, for

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121. William Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 483-84 (1977).

122. *Id.* at 484.

123. *Id.*

124. William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439, 1452 (1968).

125. Van Alstyne, *supra* note 121, at 451 (emphasis added).

126. *Id.* at 487.

127. See Smolla, *supra* note 50, at 98 n.108 (emphasis added). Accord Williams, *supra* note 82, at 18 & n.54; Simon, *supra* note 59, at 185 n.121.

it not only produced circularity but also rendered "life" and "property" glaringly redundant.

The textualist rout of Van Alstyne's early attempts was temporarily distracting but could not, ultimately, be devastating. The animating spirit of functionalism is precisely that the textualist point misses the point. To become fixated on the words "liberty" or "property," the functionalist warns, is useless and even perverse. No matter how ingenious the manipulation, terms used by 18th century natural lawyers cannot be made meaningfully to comprehend the contemporary regulatory state and, in the effort, we will lose sight of the fundamentally important idea towards which the entire constitutional phrase is reaching. That idea is to safeguard the individual from government power that strikes arbitrarily and unfairly, to secure from collective domination the citizen's capacity for self-determination and his integrity as a moral and political being. Thus, whereas textualists like Reich and Williams conceptualized due process as designed to protect the *property* that is individual security from dependence upon government and the *liberty* that is individual freedom from collective tyranny, functionalism insists that due process is designed to protect, directly and immediately, *individual security* and *individual freedom*.<sup>128</sup>

Once the object of concern is seen to be the individual and the preservation of his capacity as autonomous moral and political agent (rather than categories of interests the protection of which is merely instrumental to this end), the question of what triggers due process protection becomes far less important. "[D]eprived of life, liberty, or property" is simply a synecdoche for the range of government actions that could endanger "what it means politically to be an individual or to act as an individual."<sup>129</sup> To invoke due process scrutiny, all that would seem necessary is some non-trivial harm perpetrated or threatened against the individual by a government actor.<sup>130</sup> The truly significant constitutional inquiry becomes: What exactly does protecting the individual from arbitrary government power entail?

Government could be said to act arbitrarily or unfairly when it harms the individual on the basis of a careless or unsound assessment of the facts of his case, or when it treats him less favorably than it treats similarly situated persons. But functionalist interpretations of due process, while not denigrating the importance of accuracy and equality, have not centered around either of these qualities—perhaps because entitlement analysis (whatever its other faults) is explicitly concerned with the correct application of decisional standards to

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128. See, e.g., Mashaw, *supra* note 85, at 439; Richard Saphire, *Specifying Due Process Values: Toward a More Responsive Approach to Procedural Protection*, 127 U. PA. L. REV. 111, 148 (1978).

129. See, e.g., Mashaw, *supra* note 85, at 439.

130. Hence, in a functionalist conception of due process, some formulation like the Monaghan/Ely "every interest valued by sensible persons," see *supra* note 79, could indeed serve simply as a standing requirement.

the individual case,<sup>131</sup> and equal protection analysis is the most direct vehicle for addressing disparate treatment. The principal contribution of functional approaches has been to insist that the fair, non-arbitrary exercise of government power requires more than simply correct outcomes and equal treatment. It also requires a process of interchange between government and the individual that acknowledges his existence and value, that respects and affirms his dignity.

A decisional process consonant with individual dignity implies, at a minimum, rights of what Frank Michelman, Edmund Pincoffs, Richard Saphire and others have called "revelation" and "participation." As Pincoffs explains, "Decency generally requires that a man seriously and adversely affected by an official's decision be told why the decision was made as it was, and that he be allowed to contest the reasoning that supposedly justifies the decision."<sup>132</sup> These rights contribute to substantive fairness, but *at least as significant* is their importance to the human mind and spirit. Laurence Tribe explains, "Both the right to be heard from and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be *consulted* about what is done with one."<sup>133</sup> Consonant with our deepest intuitions about how the government of a free people ought to treat its citizens, the identification of an essential dignitary dimension seems finally to get at "what really bothers us" in the due process cases: Government should deal fairly and humanely with people, especially when it contemplates harming them, and it should not require something in positive law to trigger this obligation.

The intuitive appeal of a dignitary conception of due process can be analytically supported by tenets of moral and political theory, as well as by observations about the formation of individual and societal identity. Pincoffs locates the moral grounding of the rights to be told why, and to respond, in the Kantian injunction that each man be treated as an end in himself and not merely as a means.<sup>134</sup> To wreak harm on the individual without meaningfully consulting him because it is cheaper, or quicker, or simply less bother not to involve him, is to reduce him to an instrument in the service of efficiency or inertia.<sup>135</sup> This moral imperative parallels a political imperative. Mashaw explains, "This tradition has at its core the notion that individuals are the basic units of moral and political value."<sup>136</sup> "The protection of the due process clauses is the protection of individual liberty—a condition of liberal citizenship

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131. See *infra* text accompanying notes 180-81, 184, 217.

132. Edmund Pincoffs, *Due Process, Fraternity, and a Kantian Injunction*, 172, 172 in NOMOS: DUE PROCESS (J. Roland Pennock & John Chapman eds. 1977).

133. L. TRIBE, *supra* note 50, at 666 (emphasis in original).

134. Pincoffs, *supra* note 132.

135. *Id.* at 176-79.

136. J. MASHAW, *supra* note 43, at 182.

in which the significance of individual interests is individually determined.”<sup>137</sup> In such a political order, government must treat each citizen as an end in himself and not merely as a means for the attainment of collective ends. And, as Michelman points out, revelation and participation may be integral to the individual’s sense of self and to the citizen’s conception of his society. For the individual, learning why a government official is treating him unfavorably may “fill[ ] a potentially destructive gap in the individual’s conception of himself.”<sup>138</sup> If the harm descends in silence, he is left with the anxiety of uncertainty, never sure whether and in what respect he was found lacking; with knowledge may come pain, but also the opportunity for further self-awareness and growth. Similarly, to be able to respond to the decision-maker, “to have played a part in, to have made one’s apt contribution to, decisions which are about oneself may be counted important even though the decision, as it turns out, is the most unfavorable one imaginable and one’s efforts have not proved influential.”<sup>139</sup> For the citizen, a rule securing this sort of process may be central to his normative vision of social and political arrangements, “expressing revulsion against the thought of life in a society that accepts it as normal for agents representing the society to make and act upon decisions about other members without full and frank interchange with those other members, a kind of accountability to them . . . .”<sup>140</sup>

Finally, gathering together all these threads, Saphire shows how the dignitary dimension of due process “constitute[s] a necessary element of the consent which is essential to the continuing viability of a just and morally supportable constitutional government”.<sup>141</sup>

[A]n individual’s willingness ultimately to be subjected to deprivatory governmental action may be directly related to the extent to which the decisionmaking process generates “the feeling, so important to a popular government, that justice has been done” . . . . According the individual the opportunity to participate in the decisionmaking process—to face the decisionmaker, to receive explanation and revelation, and to react orally—preserves and enhances her sense of personal dignity and individual autonomy, and thereby strengthens the prospects for future obligation and consent.<sup>142</sup>

And so the dignitary conception of due process is revealed, not as some flimsy tissue of “feel good” constitutional interpretation, but as the fundamental

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137. Mashaw, *supra* note 85, at 439.

138. Frank Michelman, *Formal and Associational Aims in Procedural Due Process*, in NOMOS: DUE PROCESS, *supra* note 132, at 127.

139. *Id.* at 127-28.

140. *Id.* at 128.

141. Saphire, *supra* note 128, at 189.

142. *Id.* at 190-91, quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 (1951) (Frankfurter, J., concurring).

pattern of our moral and political fabric, the strong warp and woof of our sense of our selves and our society. And, at this point, the dignitary conception unravels.

The fateful loose thread is consent. Consent, the manifestation of choice, is critically important to the picture of the individual as autonomous moral and political actor. The dignitary conception of due process is founded upon the proposition that a fair, moral society must safeguard the capacity for individual self-determination. Its proposed rights of revelation and participation are part of a larger emphasis on ensuring a system of social ordering that is comprehensible and responsive to those who dwell within it: a system in which the individual is not at the mercy of capricious, unknowable, uncontrollable forces but rather is able to engage in the deliberate ordering of his life, to contemplate competing visions of what is good and desirable, and purposefully to direct his actions towards the goal he has selected. But the foundational proposition has an equally basic corollary: A freely chosen fate is not an unfair fate. If individual dignity necessarily requires the opportunity to act and not simply to be acted upon, to determine one's own life and not simply to have one's life determined, it necessarily implies accepting responsibility for the actions one has taken, the decisions one has made. And, in many cases, one of those decisions is voluntarily to seek benefits, statuses or other relationships from government *in spite of the fact* that no procedural protections are offered.

Attempts to modify dignitary theory to take account of the significance and consequences of individual choice yielded a variant functional approach called monopoly theory. Monopoly theory begins at the familiar starting point: Due process aims to protect citizens from arbitrariness and unfairness in their interactions with government. It goes on, however, to add an important caveat: *when there is no other effective check on governmental power in the precise situation involved.*<sup>143</sup> One of the principal checks on government repression is extra-legal—the market. “Where government competes with private entities or other governments for some item, such as labor, then the individual has the weapon of *choice* available . . . .”<sup>144</sup> If government will enter into a beneficial relationship only on terms that appear arbitrary or overreaching, but the individual nevertheless goes ahead to deal with it rather than seeking alternate providers, on what basis could government's position be condemned as unfair or illegitimate?<sup>145</sup>

Hence, what follows from understanding the function of due process as the preservation of individual autonomy and self-determination is not ubiquitous rights to participation and revelation, but rather procedural protection tailored to those situations in which government's monopoly position forecloses the

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143. Timothy Terrell, *Causes of Action as Property: Logan v. Zimmerman Brush Co. and the "Government-As-Monopolist" Theory of the Due Process Clause*, 31 EMORY L.J. 491, 499 (1982).

144. *Id.* at 500 (emphasis in original).

145. *See, e.g.*, Smolla, *supra* note 50, at 111; Terrell, *supra* note 4, at 371-73.

opportunity for choice. For due process to interpose a set of (inevitably costly) procedures beyond these situations would be not only grossly inefficient—"government should be as free to structure its employment contracts and other contracts as would any other member of the relevant market"<sup>146</sup>—but also deeply paternalistic, denying the individual the responsibility and capacity to order his relationships in a way that reflects the value *he* places on procedure.<sup>147</sup>

Monopoly theory thus arrives, though by a different conceptual route, at a standard for triggering due process protection very similar to Stephen Williams' pay-twice and private-preclusion tests. In fact, monopoly theorists reach many of the same conclusions in specific cases. Welfare benefits and public education require due process protection because individuals have no choice but to deal with government to obtain these things.<sup>148</sup> Occupational licenses would be protected on the same theory.<sup>149</sup> By contrast, virtually no government employment relationships would be covered by due process; even in such classic public sector jobs as police officer, the individual has not only private analogues (*e.g.*, security guard) but also choice among levels and locations of governmental employers.<sup>150</sup> Social security retirement payments and unemployment compensation would be protected because the individual has no choice about participating in these programs.<sup>151</sup>

Although its aggressive market rhetoric jars ears attuned to dignitary reasoning, anyone who sees in due process a societal commitment to individual moral and political autonomy must take seriously monopoly theory's exploration of the conditions of individual choice. However, rigorously pursuing the concept of "choice" is a notoriously difficult undertaking—as illustrated by the loose application of the word by monopoly theorists themselves. Except in rare cases, it is not literally true (as the economist would be the first to insist) that the individual has "no choice" but to rely on government to educate his children or provide for his retirement, disability or unemployment.<sup>152</sup> Per-

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146. Terrell, *supra* note 59, at 904. See Smolla, *supra* note 50, at 115; Terrell, *supra* note 143, at 500. See also Terrell, *supra* note 4, at 385 n.127 (rejecting argument that government has "moral leadership" obligation to be "better" than others in market; "better" in this situation necessarily means 'inefficient' and 'more expensive'").

147. As Thomas Grey reminds us, the commitment to the morally and politically autonomous individual is commonly understood as entailing the belief that "[c]ompetent adults . . . should be free to enter into transactions even on terms which by prevailing sentiment are regarded as unreasonable." Grey, *supra* note 67, at 893. Cf. Reich, *supra* note 78, at 774 ("Liberty is the right to defy the majority, and do what is unreasonable.").

148. Terrell, *supra* note 59, at 904; Smolla, *supra* note 50, at 116.

149. Terrell, *supra* note 59, at 904.

150. *Id.* at 904, 908.

151. *Id.* at 905.

152. If he regards the conditions under which he can obtain these public benefits as sufficiently dispreferential, he will avoid or minimize the undesirable aspects by purchasing private supplements or alternatives. True, he is required to underwrite these public undertakings, through the payment of taxes, whether or not he participates as a beneficiary. But if monopoly theory uses "no choice" to refer to compulsory contribution, it just restates Williams' "pay twice" test, and will encounter the same problems of line-drawing in a world where most individuals have no option but to pay for government activities.

haps, then, we are to understand the designation "no choice" as a capitulation to the average person's mulish tendency to perceive decisions which would require sacrifice of other valued possessions, activities or conditions as "not *really* choices," rather than as the purposeful implementation of preference ranking. But if "choice" is to be treated as a psychological phenomenon, how could employment be categorically distinguished? In many (perhaps most) cases, people do not experience jobs as fungible given appropriate adjustments for changes in working conditions, geographical location, etc. And jobs that *are* sufficiently common in most communities that they might be experienced by their holders in this way—for example, the pink collar and blue collar jobs that monopoly theory summarily excludes from due process protection<sup>153</sup>—tend to present a different complication. If, as is often true with such jobs, private-sector alternatives do not include any procedural protection, in what sense could the individual's choice of position be said to evince the value *he* places on procedure? Disciples of the market might assure us that, in such cases, the market has accurately implemented the preference of this class of employees generally for wages and other substantive benefits over procedures. But if "choice" is merely acquiescence in some pre-existing collectively struck balance of substance and procedure, as signalled by the individual's decision to enter or remain in a particular labor pool, then the constitutional status of occupational licenses must to be reconsidered.<sup>154</sup> And, having focused on the degree to which the individual should be held to have consented to the consequences that predictably follow from the way he chooses to order his life, can we automatically accept that recipients of welfare and other need-based benefits had "no choice" about dealing with government?

Thus, the difficulty with monopoly theory's effort to refine the dignitary conception to account for the significance of individual choice is that no coherent concept of choice emerges. In part, this comes from attempting to superimpose the idea of monopoly, a slippery enough notion in the private sector, onto the individual's interactions with government. More fundamentally, any serious inquiry into the extent of individual responsibility eventually recapitulates the debate between free will and determinism—a debate that becomes, if possible, even more vexed when directed at the condition of the individual situated in the economic, social and political reality of the contemporary regulatory state. It would seem that dignitary theory must, as its monopoly

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See *supra* text accompanying note 115.

153. See Terrell, *supra* note 59, at 906. Cf. Williams, *supra* note 82, at 28 (excluding from protection "the common garden variety of government worker").

154. Those who decide to become lawyers or doctors know that access to the considerable financial and social rewards of those professions depends upon government approval. To be logically rigorous, must we not assume that the choice to enter law or medical school signals an individual's deliberate assessment that any uncertainty inhering in the licensing process is compensated for by the rewards awaiting those who successfully negotiate it? Unlike monopoly theorists, Stephen Williams acknowledged this as a "nagging" problem. See Williams, *supra* note 82, at 30-31. Perhaps this is why he treats occupational licenses as a direct burden on liberty rather than under a preclusion-of-choice analysis. See *id.* at 22, 31.

cousin insists, stake out some middle ground between the two extremes. It must establish some position in which the possibility of real autonomy and self-determination can be reconciled with the power and ubiquity of the welfare state, and in which vigilance in protecting the conditions of meaningful individual choice is accompanied by acknowledgement that the individual is responsible for what he has chosen. So far, however, dignitary theory has not been able to do so.

The problems posed by consent extend further still. Rights to revelation and participation can not exist in the abstract; they must be addressed to (more accurately, directed against) some identifiable person, the decisionmaker. They represent the power to bend another's will to one's own, to compel access to the reasoning processes—processes closest to the core of personhood of a rational being—of another individual who is, by hypothesis, unconsenting. As Michelman forthrightly concedes, "A due process entitlement is a concession to its holder of control over—one might as well say ownership of—bits of the behavior of the relevant officials."<sup>155</sup> The dignity of the individual seeking government benefits can be rescued only, it seems, at the high cost of objectifying the individual allocating them.<sup>156</sup> Moreover, even if it were possible theoretically to resolve this dilemma, the quest for dignitary process may prove, as a practical matter, hopelessly quixotic. Again, Michelman is painfully honest:

[I]t can be argued that a due process entitlement . . . cannot convey the nonformal, the interpersonal meanings of revelation and participation . . . because an official whose explanations and interchanges have been *requisitioned* by someone who assertedly *owns* those elements of his behavior just will not be engaging in the kinds of acts which carry the interpersonal meanings that (possibly) we yearn for.<sup>157</sup>

Mashaw is even blunter: "To rethink participatory process rights in terms that make them meaningful at the level of self-definition or in terms of the desire for community may be, necessarily, to make them nonjusticiable."<sup>158</sup>

As dignitary theorists looked deeper into the implications of *judicial* enforcement of dignitary rights, the problems became graver yet. In its politi-

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155. Michelman, *supra* note 138, at 149.

156. See J. MASHAW, *supra* note 43, at 192:

[W]hat is to be said of Roth's colleagues who object to spending their time pursuing Roth's purposes? Are they not being used as mere means? May they not wield the categorical imperative to demand privacy from Roth's incessant pursuit of participatory governance? Where is the principle of limitation that would adjust competing claims or ends.

157. *Id.* at 149 (emphasis in original). This 1977 article has become the classic exposition of the dignitary conception. Michelman's more recent work outside the area of procedural due process suggests that he would not approach these issues in quite the same way today. See, e.g., *Law's Republic*, 97 YALE L.J. 1493 (1988); *Takings*, 1987, 88 COLUM. L. REV. 1621 (1988); *Possession vs. Distribution in the Constitutional Idea of Property*, *supra* note 55.

158. J. MASHAW, *supra* note 43, at 180. *Accord id.* at 200, 216-18.



cal dimension, the commitment to individual self-determination is a commitment to equal voice.<sup>159</sup> Majority rule is the collective expression of respect for each individual as autonomous political actor. Mashaw explains that equality is one of the core dignitary values in our particular constitutional culture: "Any judicial decision that imposes procedures contrary to those arrived at in the majoritarian political process accordingly carries some anti-egalitarian stigma, even if that intervention is itself premised on egalitarian concerns."<sup>160</sup> It is the problem of consent, writ large. How can the judiciary discern when the ordering of positive law must be rejected so that self-determination can flourish? Mashaw's answer, ultimately, is that it cannot. Due process embodies our commitment to individual moral and political autonomy and yet, at the same time, "developing, pursuing, and maintaining individual interests must be preserved through, as well as in defiance of, collective action."<sup>161</sup> No dependably determinate criteria exist for knowing when to displace the process choices that emerge from the majoritarian process. Therefore, as a general matter, the Court must defer to the legislature's specification of decisionmaking structures, insisting only that the process choice be reasonably coherent.<sup>162</sup>

And so, ironically, the dignitary approach comes, in the end, to "explain[ ] our concern to respect the positive law."<sup>163</sup> Mashaw professes to be "not dismayed" that the quest to secure individual dignity and autonomy should end at the legislature not at the court.<sup>164</sup> "I believe," he argues, "that we should give ourselves laws primarily through nonjudicial institutions of private and public ordering, and that the compromised character of public life necessarily limits the degree of constitutionalization that will accommodate our constantly shifting needs to mediate the clash of individual and group interests."<sup>165</sup> But others—those who have less faith, or had greater hopes—see a darker meaning in where dignitary theory found itself. Colin Diver captures it best: "Mashaw's pilgrimage through the wilderness of due process yields a message and a lesson. Due process must save the individual from being engulfed by the bureaucratic state, reads the message. But the lesson answers: There is no escape from the positivist trap."<sup>166</sup>

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159. See, e.g., J. MASHAW, *supra* note 43, at 173, 199-200. See also Mashaw, *supra* note 85, at 439-40.

160. J. MASHAW, *supra* note 43, at 173-74. Jerry Mashaw's work is particularly illuminating for he, more than any other commentator, has persistently engaged the dilemmas of procedural due process jurisprudence. His book, *DUE PROCESS IN THE ADMINISTRATIVE STATE*, is the culmination of years of effort "to come to terms with our liberal, individualist aspirations in the context of a collectivized, bureaucratic public life." *Id.* at 41.

161. Mashaw, *supra* note 85, at 439.

162. J. MASHAW, *supra* note 43, at 242. See *id.* at 172-73, 212-53; Mashaw, *supra* note 85, at 439-43.

163. J. MASHAW, *supra* note 43, at 219.

164. *Id.* at 218.

165. *Id.*

166. Diver, *supra* note 81, at 1530.

B. *Inside the Positivist Trap*

*"Immodesty is not avoided, but only concealed."*<sup>167</sup>

Accepting (albeit reluctantly) that the existence of "property" must always, and "liberty" must often, turn on the content of positive law does not end the matter of entitlement. Indeed, it simply introduces another set of questions. What attributes of positive law will constitute a protected interest? Who decides whether they are present? Is it relevant whether the individual reasonably *believed* they were present? The answers to these questions are not determined simply by the choice of a positive law trigger for due process. We would, however, expect the answers to be guided by, and consistent with, the principles and concerns which led to that choice.

Our expectations will be disappointed. In essence, a federal court enforcing current due process doctrine says to the national political branches and to the states:

We will prevent you from depriving an individual, without due process, of those interests which you have chosen to define in a certain fashion—that is, through use of specific, mandatory, substantive standards that meaningfully constrain the discretion of the official decisionmaker. Rest assured, you really are in control here. We have nothing to say about how, or even whether, you define interests in the first instance; we have nothing to say about interests you choose to define in some other fashion. Indeed, we are primarily concerned about what you *really meant* to do, not what the individual might have *thought* you did. And our standard for standards, if you will, has gotten pretty high, just as we've become very hesitant to hold you to anything that you haven't expressly and formally undertaken. But keep this also in mind. As to interests which you *have* defined in the critical fashion, your views about the process appropriate to implement those interests are not controlling on us.

This is doctrine so patently absurd that criticizing it seems about as challenging as shooting fish in a barrel. Only by disassembling it, and understanding how each piece came to be present, can we appreciate that the alternatives threatened to make of due process either the warrant for boundless judicial intervention in administrative government, or the meaningless rubber stamp of whatever process the legislature decides is due.

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167. Pincoffs, *supra* note 132, at 172.

### 1. *The Significance of Discretion*

*"In Hell there will be nothing but law,  
and due process will be meticulously observed."*<sup>168</sup>

Why identify the constitutionally-critical component of positive law to be specific, substantive standards that limit the discretion of the official decision-maker? As commentators have pointed out,<sup>169</sup> the presence of explicit, mandatory decisional criteria is no gauge of the importance to the individual of the benefit or status at stake. Because of the standards requirement, due process might intervene when an official gives you a \$5 parking ticket, but not when he terminates your employment; when he publicly labels you a drunkard, but not when he tells local merchants you are a shoplifter. All turns on the fortuity of how the legislature framed the pertinent statute or regulation.<sup>170</sup>

If the standards requirement operates capriciously with respect to the importance of the underlying *substantive* interest at stake, it appears an absolute disaster with respect to the importance of *procedural* protection. No regime would seem more threatening of the citizen's autonomy, security and dignity than being at the mercy of a bureaucrat whose behavior is unchannelled by fixed, substantive rules. No circumstance would seem to cry louder for the interposition of the constitution between the individual and government power. And yet, the more discretion positive law confers on officials—the closer the legal regime comes to the nightmare vision we call Kafkaesque<sup>171</sup>—the more certain it is that due process will not intervene. The Court, it seems, has created a doctrine that is "impotent where official power is most in need of procedural monitoring . . . ."<sup>172</sup>

Why, then, does the Court not only cling to the requirement of discretion-constraining standards, but actually seem to be ever more rigorous in the specificity and mandatoriness demanded? With respect to importance of the interest, *substantively*, to the individual, the explanation is straightforward (even if unpleasant). It is immaterial that the standards requirement is a poor proxy for importance because importance cannot be the constitutional trigger; importance cannot be the trigger because there are no justifiable, sufficiently determinate criteria by which it could be measured (at least by a national

168. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 111 (1977).

169. *E.g.*, Williams, *supra* note 82, at 13; Mashaw, *supra* note 85, at 436-37.

170. Indeed, not only does specificity of decisional standards have no logical relation to importance of the interest, it may actually be inversely correlated. Although some decisions of signal importance to individuals are heavily standard-bound (*e.g.*, welfare), it is often the case that important issues are too complex to be resolved through a fixed set of rules specified in advance (*e.g.*, parole). To make such rules the indispensable predicate of due process may skew constitutional protection towards more mundane interests susceptible to resolution through a pre-set decisional code.

171. Kafka's work, particularly *The Trial*, has been a powerfully recurring symbol in this area. *E.g.*, J. MASHAW, *supra* note 43, at 175-76; Rabin, *supra* note 108, at 78 n.66; Easterbrook, *supra* note 91, at 116; Tribe, *supra* note 86, at 277.

172. Mashaw, *supra* note 85, at 438. *Accord* L. TRIBE, *supra* note 50, at 676.

judiciary proposing to second-guess the judgments of state and federal legislators and administrators) for the many forms of largess distributed by the contemporary regulatory state.<sup>173</sup> If such criteria existed, we would not be stuck here in the positivist trap.

With respect to the importance to the individual of *procedural* protection in his interaction with government officials, the reason why the Court cleaves to the standards requirement is more complicated. The Court justifies the requirement on purely utilitarian grounds: When official judgment is not bound by mandatory decisional standards, process is not needed.<sup>174</sup> Since the common reaction is exactly the opposite—the standards requirement denies process precisely where it is most needed—the justification must go beyond a bald assertion of utility. We need to understand what criteria of “need” are being applied in this debate.

The critics’ insistence that process is most “needed” where decisions are discretionary comprises four strands. The first is the familiar concern with human dignity: “[I]ndividual participation is most required in such subjective situations precisely to avoid an individual’s feeling that her life and liberty

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173. See generally Richard Stewart & Cass Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1257-58 (1982). Peter Simon has argued that the standards requirement is essential to implement constitutional provision that protects “property” because property is “an interest one can insist upon, rather than one which turns upon the good will of another.” Simon, *supra* note 59, at 171. Simon’s argument draws apparent support from Gregory Alexander’s earlier observation that neither legal nor popular usage recognizes as property “those interests which are subject to a power, held by another person or entity from whom the interest derives, to extinguish unilaterally all opportunity for the claimant to obtain future enjoyment of the asset.” *The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis*, 82 COLUM. L. REV. 1545, 1561 (1982). When summoned to the defense of entitlement analysis, however, this insight proves much too much. Surely, the state and federal legislatures which create government jobs, licenses, social welfare benefits, etc., have the power to extinguish, unilaterally and prospectively, most (if not all) of these advantageous relationships.

We might avoid the conclusion that *no* interest created by regulatory statutes could be “propertyish” (because legislatures always have the power to change their minds) by insisting on a distinction between the legislature and the executive. The officials who administer regulatory programs usually do not possess “a legally recognized power of termination” exercisable in their “unrestricted discretion.” *Id.* at 1571. Where this is most evidently true is, indeed, where the law establishing the program expressly sets forth standards to govern the behavior of the officials who run it. However, if we thus modify the Alexander formula, the rigor of the present standards requirement can not be defended. Alexander uses two hypotheticals to illustrate the difference between property and non-property. In the first, Alpha, the owner of a bottle of rare wine, says to Beta, “I will deliver the wine to you next week *unless I need it tomorrow night at a dinner party*.” In the second, Alpha says “The wine is now yours and I will deliver it next week *unless in the meantime I decide to keep it or give it to someone else*.” In the first, Beta obtains a property interest in the wine; in the second he does not. *Id.* at 1563-64. The difference, of course, is the extent to which Alpha retains discretion. Note, however, that the standard contained in the first hypothetical does not completely withdraw discretion from Alpha. Although there may be extreme circumstances in which the condition “unless I need it at my dinner party” will have one, obvious, indisputable application to the facts, in the “normal” range of cases Alpha will exercise judgment about whether the wine is “needed.”

If Alexander is correct, then, “propertyish-ness” can co-exist with discretion so long as there is enough substantive guidance in the initial commitment to allow us to think meaningfully about reasonable, good-faith judgment in contrast to bad-faith caprice. And if this is so, the standards requirement—at least in its present, highly restricted form—is grossly underinclusive in identifying “propertyish” interests created by regulatory statutes. How often does a legislature which empowers an official to distribute bottles of wine (or grant parole, or transfer prisoners, or renew teaching contracts, or employ policemen) mean to give the official carte blanche to deliver it to the Betas of the world “unless you decide to keep it or give it to someone else?”

174. See, e.g., *Loudermill*, 470 U.S. at 543 n.8; *Olim*, 461 U.S. at 250; *Meachum*, 427 U.S. at 228.

have been dealt serious affliction without reason or explanation."<sup>175</sup> The second is a related concern with the felt legitimacy of government action:

[I]t is especially important to give process values their due in those circumstances, often frequent, in which the standards for evaluating process results are not clear or are not agreed upon, or the facts required for applying agreed-upon standards are not ascertainable. In these circumstances, the entire "process-result" aggregate can be judged only in terms of the quality of the process itself . . . .<sup>176</sup>

These two strands are drawn from the conception of due process as intended to preserve the individual's status as autonomous moral and political actor. The remaining two strands take a utilitarian view of the function of process that is more expansive than the Court's. One strand (thoroughly familiar to administrative lawyers) argues that a process in which the decisionmaker makes known his views and seeks comments from interested persons yields better decisions, particularly in situations where complex policy or factual judgments require considerable agency discretion.<sup>177</sup> The other strand, taking a systemic remedial perspective, observes that cases in which positive law sets mandatory decisional standards are the very cases in which there typically exist subconstitutional causes of action for challenging agency behavior; to confine due process intervention to these situations "has the odd consequence of protecting those and only those who do not need protection."<sup>178</sup>

Although the Court has never systematically responded to critics of the standards requirement, its reply to each strand of their attack is not too difficult to reconstruct. With respect to the first, dignitary, strand of criticism, *Dixon v. Love*<sup>179</sup> provides a starting point. Love's driver's license had been revoked summarily, pursuant to statute, because official records showed that his license had been suspended three times within a ten-year period. Rejecting his plea for some opportunity to be heard prior to revocation, the Court reasoned:

Such an appearance might make the licensee feel that he has received more personal attention, but it would not serve to protect any substantive rights. We conclude that requiring additional procedures would be

175. L. TRIBE, *supra* note 50, at 676. Even Frank Easterbrook agrees that "[t]he argument for 'dialogue' with decisionmakers as a basis of dignity is strongest when the rules are most uncertain." Easterbrook, *supra* note 91, at 116.

176. Robert Summers, *Evaluating and Improving Legal Processes—A Plea for "Process Values,"* 60 CORNELL L. REV. 1, 5 (1974).

177. See, e.g., Frank Michelman, *Procedural Due Process of Law, Civil*, in *ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION* 1465, 1468 (Leonard Levy, Kenneth Karst & Dennis Mahoney eds. 1986); Williams, *supra* note 82, at 21 n.72; Rubin, *supra* note 5, at 1133-34.

178. Patricia Smith, *Commentary on Terrell: Definition and Metaphor in Legal Analysis*, 39 U. FLA. L. REV. 387, 395 (1987). Accord Mashaw, *supra* note 85, at 437. Todd Rakoff aptly dubs this the "double-or-nothing aspect" of the doctrine. Rakoff, *supra* note 49, at 174.

179. 431 U.S. 105 (1977).

unlikely to have significant value in reducing the number of erroneous deprivations.<sup>180</sup>

There is, in other words, no “substantive right” to be dealt with in a manner that acknowledges one’s existence and affirms one’s worth.<sup>181</sup> The function of process is to reduce errors—period. *Dixon* does not elaborate upon why the preservation of individual dignity can not claim substantive protection but, then, we already know the problems with locating such a right in the due process clauses. They are the problems that prevented the dignitary conception, appealing as it is, from freeing the doctrine from the positivist trap in the first place. As Michelman reminds us, “If we see due process as concerned with the quality of interaction between government and citizen . . . then *any state-inflicted grievous loss* will seem to bring into play the constitutional standards . . . .”<sup>182</sup> The Court would find itself second-guessing the dignitary adequacy of the host of state and federal regulatory activities and programs, struggling with the meaning of individual consent and the significance of an apparent majoritarian consensus—and all to arrive at the morally problematic and practically futile point of attempting to coerce one individual to talk and listen, respectfully and openmindedly, to another individual. And, as the dignitary strand falls, so falls the related strand which argued that process is needed to legitimate the exercise of agency discretion. Indeed, the federal judiciary might well experience even greater doubt about its institutional competence in, and constitutional warrant for, defining—in the teeth of state and national majoritarian processes—what decisional structures will best inspire confidence in the citizenry that important decisions are being made regularly and thoughtfully.<sup>183</sup>

This leaves the two critiques of the standards requirement that are explicitly utilitarian. At first blush, it seems that these strands of the commentary ought to be more telling attacks on the doctrine, for they meet the Court on its own terms and make, in effect, the following argument. *Even if* the only workable conception of the function of due process is producing better outcomes, the standards requirement makes no sense, for process can also serve this function when officials exercise discretion. *Meachum* is the perfect illustration. If (as no one disputed) the plaintiffs were in fact transferred to a higher-security prison because officials believed they had misbehaved, the utility of a hearing to forestall erroneous transfers exists quite apart from whether some rule of

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180. *Id.* at 114.

181. One could, of course, acknowledge such a right and then go on to conclude that it was not infringed significantly (or unjustifiably) on the facts of *Dixon*.

182. Michelman, *supra* note 177, at 1469 (emphasis added).

183. The Court has curbed lower federal courts who attempted this task in the context of subconstitutional adjudication involving federal agencies. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519 (1978). If you add the constitutional context and the federalism implications of telling state agencies how to proceed, the prospect is almost unthinkable.

law predicates transfer on misbehavior. The capacity of process to facilitate sound decisions rests not on the existence of mandatory substantive criteria formally constraining government action, but rather on the elementary facts that (1) agency officials, like the rest of us, usually have reasons for what they decide, and (2) those reasons usually involve beliefs about the existence of facts and the appropriate application of policies and principles to them. Interchange with affected individuals can provide relevant, helpful information in both of these areas. The nature and extent of discretion might affect the *type* of process afforded, but the presence of discretion would not signal whether process is useful at all. Surely the Court ought to realize this.

Surely the Court does realize this. When it responds to the *Meachum* plaintiffs' argument that a hearing might have prevented a wrong decision by reiterating that "no legal interest or right of these respondents under Massachusetts law would have been violated by their transfer whether or not their misconduct had been proved,"<sup>184</sup> it is not missing the point. It is making a point. The goal of due process is not *good* administrative decisionmaking, it is *accurate* administrative decisionmaking. Moreover, the accuracy due process seeks is accuracy of a very special and limited nature: the reliable ascertainment of whether, on the basis of determinable facts, legally sufficient justification exists for official action. This may be a crabbed, legalistic (in the very worst sense of the word) notion of protecting the individual from erroneous deprivation by government officials, but what are the alternatives? What could be more indeterminate and intrusive into regulatory processes than a constitutional quest for procedures that produce "better" decisions? By what criteria would you have an unelected, generalist, national judiciary measure "good" prison transfer decisions if not by the criteria specified in positive law? And if there are no criteria sufficiently specific that a court could reliably determine whether they are satisfied and sufficiently mandatory that it could then compel official action, where would a more expansive view of "*erroneous* deprivation" lead? Suppose the *Meachum* plaintiffs are given a hearing in which they establish that, contrary to official belief, they did not misbehave. What is to prevent officials from then saying, "We are going to transfer you anyway"? As Easterbrook bluntly puts it, in the absence of legal constraints on administrative discretion, "there is no need for a hearing, because the state's officer need not pay attention to the claimant's demands; the state may do what it pleases."<sup>185</sup> If such constraints are not to be found in positive law, they would have to be found in the due process clause. And if we had an acceptable theory for identifying such constraints in the due process clause, we wouldn't be stuck in the positivist trap.

In sum, for the Court to accept the plea for due process protection in the absence of explicit, mandatory, positive law standards would be to "place the

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184. 427 U.S. at 228.

185. Easterbrook, *supra* note 91, at 87-88.

Clause astride the day-to-day functioning of [agencies] and involve the judiciary in issues and discretionary decisions that are not the business of federal judges."<sup>186</sup> Few commentators—even those highly critical of the present doctrinal approach—have taken issue with that assessment. The standards requirement might yield a straitened doctrine, ungenerous in its protection, but at least it represents a judicial stance that is appropriately modest in a representative democracy. Within its shelter, the courts are simply applying rules that emanate from the legislative sovereign.<sup>187</sup> And so the Court might respond to the fourth and final strand of criticism—the standards requirement provides protection only for those who are already protected—by quoting Hippocrates "First, do no harm."

## 2. Promises and Procedures

*"Great nations, like great men,  
should keep their word."*<sup>188</sup>

Perhaps it unfairly denigrates the present doctrinal conception—in which due process functions essentially to secure rule obedience—to imply that its principal justification is the defensive claim, "At least it can't do much damage." Promise-keeping may not be a *sufficient* condition of legitimate government, but it would seem to be a *necessary* condition. A due process doctrine which insists that government abide by the assurances it has given its citizens about how largess will be distributed or sanctions imposed would go a long way towards enhancing individual autonomy and security. That the doctrine does not go further—to force the giving of assurances or to police their content—might be accepted as a regrettable but inevitable accommodation in a world in which the proliferation of administrative government has rendered the judicial task of constitutional enforcement simultaneously most necessary and most problematic.

To the extent that the Court has articulated *any* theory undergirding its entitlement reasoning, that theory does seem to be the protection of individual expectations. *Roth* explained: "It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."<sup>189</sup> Unfortunately, after all the competing pressures have operated upon the doctrine, the result is not a sensible compromise between the need of the people for security in expectation and the need of the judiciary to

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186. *Meachum*, 427 U.S. at 228-29. See also cases cited *infra* note 196.

187. See Michelman, *supra* note 138, at 129-30; Michelman, *supra* note 176, at 1467.

188. *FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting).

189. 408 U.S. at 577.



respect political and administrative judgments, but rather a deeply compromised muddle that makes no sense from any perspective.

In the first place, the doctrine refuses to acknowledge many sources from which individuals naturally and justifiably develop expectations about how government will dispense benefits and burdens. Institutional practice is an obvious example. Particularly in the case of a close, ongoing relationship between the agency and the individual—as in *Meachum*—patterns of conduct observed and experienced over time are often more influential than formal, written rules in shaping the individual's beliefs about how officials will behave. When the *Meachum* court dismisses “[w]hatever expectation the prisoner may have in remaining at a particular prison so long as he behaves himself” as “too ephemeral and insubstantial to trigger procedural due process protections,”<sup>190</sup> it implies a view of “expectation” that seems to have little to do with psychological reality. In addition, the doctrine ignores even some formally expressed constraints on behavior. *Paul v. Davis* rejects defamation law as a source of entitlement to reputation, and yet what is that law but a collection of rules defining the bounds within which individuals can feel secure in the enjoyment of their good name? When the *Paul* Court asserts that “Kentucky law does not extend to respondent any legal guarantee of present enjoyment of reputation which has been altered” when officials circulate his name as an active shoplifter,<sup>191</sup> it implies a view of “expectation” that seems to have little to do with legal reality. Most broadly, the doctrine is wilfully blind to the background understanding—shared by citizens, legislators and administrators alike—that regulatory programs have comprehensible, identifiable objectives and that government officials are given power that they might pursue those objectives, not that they might indulge their personal predilection or caprice.<sup>192</sup> When the *Meachum* Court insists that, in the absence of explicit statutory constraints, “prison officials have discretion to transfer [a prisoner] for whatever reason or for no reason at all,”<sup>193</sup> it implies a view of “expectation” that seems to have little to do with political reality.

In the end, as *Bishop v. Wood* made clear, the current doctrine is not in fact concerned with protecting the individual's expectations about how government will behave. Faced with an ordinance that distinguished “permanent” employees, such as Bishop, from probationers and appeared to grant them tenure—even conceding that “[o]n its face the ordinance on which petitioner relies may fairly be read as conferring such a guarantee”—the Court nevertheless refused to disturb an interpretation that all employees held their posts “at

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190. 427 U.S. at 228.

191. 424 U.S. at 711-12.

192. This is not to say that regulatory goals are always (or even usually) determinate, consistent or accomplishable. But acknowledging that the mandate of many administrative programs is open-ended, conflicted, and/or unrealistic is a very different thing from asserting that power is delegated to administrators with neither object nor constraints on its use. See *supra* note 173.

193. 427 U.S. at 228.

the will and pleasure of the city.”<sup>194</sup> Only Justices Brennan and Marshall would have framed the inquiry as “whether it was *objectively reasonable for the employee to believe* he could rely on continued employment.”<sup>195</sup>

How does a Court that set out, in *Roth*, to prevent the arbitrary undermining of those claims upon which people rely in their daily lives end up so defiantly indifferent to what citizens reasonably understand to be the “The Rules” governing their government’s behavior? Perhaps it came to recognize that, in a society which clings to a normative vision of government power as limited in scope, answerable to the people, and justified only as an instrument of the public good, a doctrine truly concerned with protecting legitimate expectations about official behavior will eventually find itself squarely in the middle of almost every interaction between the citizen and his government. Surely it is no coincidence that *Meachum*, *Paul*, and *Bishop* (which collectively sound the death knell for any true expectation-based theory of due process) were decided within a four-month span. Nor is it coincidence that each perceives—and emphatically condemns—the plaintiff’s claim as opening large sectors of state and federal governmental operations to the constitutional scrutiny of the national courts.<sup>196</sup> If, in Michelman’s words, “[e]ntitlement’s antithesis can be conceived as a legally valid rule saying that treatment is to be accorded or not, according to the actor’s effectively irrefutable judgment or preference,”<sup>197</sup> then virtually every government action seriously affecting a citizen *should* be understood to implicate an entitlement for, in our legal, political and psychological understanding, public officials undertaking public business could virtually never *legitimately* claim this sort of power.<sup>198</sup> As Van Alstyne asks, “[I]s it plausible that persons contemplating the structuring of a social organization to be subsequently binding upon them . . . would agree upon a government vested with power to proceed” in such a way?<sup>199</sup> But the task of discerning and ensuring the implementation of the criteria which a citizen of a democratic, limited government could legitimately expect to constrain official behavior in the conduct of regulatory activities is precisely the indeterminate, intrusive, institutionally inapt role from which entitlement analysis was to deliver the Court.<sup>200</sup>

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194. 426 U.S. at 345 (citations omitted).

195. *Id.* at 353 (Brennan, J., dissenting) (emphasis added).

196. In addition to the language already quoted, *supra* text accompanying note 186, see *Meachum*, 427 U.S. at 229, *Bishop*, 426 U.S. at 349, and *Paul*, 424 U.S. at 701.

197. Michelman, *supra* note 138, at 132.

198. See *supra* note 173.

199. Van Alstyne, *supra* note 124, at 487-88.

200. The complications that might follow from seriously attempting to vindicate individual expectations can be imagined in *Bishop*, where the case for reliance was quite strong. If the Court held that Bishop had a protected interest in his job based on a reasonable reading of the ordinance, it would presumably require the City Manager to afford him some process prior to terminating him. But the constitutional effect could not end with procedural restructuring. What Bishop *thought* the ordinance gave him was job security in the absence of “cause” for dismissal. To protect *that* expectation, the due process clause would have to convert what local law had attempted to set up as at-will employment into tenured employment. Would the same conversion then take place for Bishop’s fellow, similarly-situated officers?

Viewed from one perspective, then, a real concern with protecting individual expectations about official behavior leads to an explosion of due process. Viewed from another perspective, however, an expectation-based theory leads to the diametrically opposite but equally unthinkable point, the extinction of due process.

Recall that among the things deliberately ignored by the highly selective vision of the present doctrine are procedural terms in positive law. What justifies looking to only part of the law to define the entitlement? A thoroughly plausible account of individual expectation would insist that anyone dealing with government could not *reasonably* expect officials to afford any more or different process, in the course of dispensing largess or imposing sanctions, than positive law provides. An economist would point out that the extent of procedure afforded is simply another way of setting the value of the benefit.<sup>201</sup> "The substantive rule itself is best seen as a promised benefit coupled with a promised rate of mistake."<sup>202</sup> We might object that the average person—the person not trained in economics—does not understand a law that promises a benefit of \$X allocated according to a procedure that has an error rate of Y% as "really" only promising a benefit of X discounted by Y. Still, so long as the process terms of the law are as clear and accessible as the substantive terms, we are hard pressed to explain why the individual's expectations would be shaped by only the "sweet" substance without reference to the "bitter" procedures.<sup>203</sup>

As we push deeper into the question of what expectations ought to be regarded (and protected) as "reasonable" expectations, we stumble, once again, into the quagmire of consent. Even the firmest constitutional commitment to individual autonomy and self-determination would not require, *in order to protect reliance*, that the regulatory relationship be adjusted *post hoc* to include terms more favorable than those of which the individual was aware when he entered into the relationship. Thomas Grey suggests that people may not read "the fine print" of procedural terms, assuming instead a "normal" or "reasonable" level of accuracy in implementation.<sup>204</sup> Even if this is so, the law tradi-

201. Easterbrook, *supra* note 91, at 112-13. Accord Diver, *supra* note 81, at 1543.

202. Easterbrook, *supra* note 91, at 113. Accord Thomas Grey, *Procedural Fairness and Substantive Rights*, in NOMOS: DUE PROCESS, *supra* note 132, at 194-5.

203. Commentators who have pointed out the internal inconsistency of the Court's refusal to allow procedural terms in positive law to affect the dimensions of the entitlement include—in addition to Easterbrook—L. TRIBE, *supra* note 50, at 671, 710-12; J. MASHAW, *supra* note 43, at 145-51; Lawrence Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323, 325-29, 341 (1987); Diver, *supra* note 81, at 1542-43; Grey, *supra* note 202, at 190-95; Rubin, *supra* note 5, at 1070; Terrell, *supra* note 4, at 373-74; Tushnet, *supra* note 84, at 270-71; Van Alstyne, *supra* note 121, 462-65; Williams, *supra* note 82, at 6-9. Henry Monaghan finds Rehnquist's "bitter with the sweet" position unwise and at odds with our tradition of distinguishing substance from procedure, but admits that it is "not inherently illogical." Monaghan, *supra* note 26, at 438-39.

204. Grey, *supra* note 202, at 195. Grey himself finds this an unpersuasive defense of current doctrine, concluding that no criteria exist for discerning a "normal" degree of accuracy in most regulatory programs. Whenever government has the power to withdraw the program entirely, "the only procedure that could reasonably be expected would be that procedure actually specified in the statute." *Id.* at 196.

tionally has little sympathy for the expectations of people who don't read what's right in front of them. Perhaps more accurately, it will relieve them of unpleasant parts of an undertaking only when it perceives fraud, overreaching or some other barrier to informed consent, or when the interest involved is regarded as so important, on some value scale, that it will be deemed inalienable. None of these notions will be easy to invoke in this context. The terms of *these* deals are set by the majoritarian processes. Any attempt to set them aside as underhanded or unconscionable implicates consent writ large. We may dismiss, as patently pollyannaish fiction, Frank Easterbrook's picture of the legislative process: "The contents of the legislation are the best available evidence about the value the affected people place on hearings."<sup>205</sup> We may share Laurence Tribe's agnosticism: "In a society whose legislative and administrative processes of value-formation and conflict-resolution seem to resemble less the ancient ideal of the polis than the contemporary notion of pluralist compromise, any suggestion that bartered rules are *necessarily* expressions of true substantive consensus seems difficult to maintain."<sup>206</sup> Still, the belief that the legislative process expresses the will of the people is so venerable an article of our constitutional creed that abandoning it seems to imperil our constitutional identity. Absolute faith might be impossible, but so long as atheism appears unthinkable, we seem committed to the possibility of divining in positive law the course of our collective self-determination.<sup>207</sup>

So, it really is not surprising that, despite *Roth's* talk about securing "those claims upon which people rely in their daily lives," the doctrine is not now constructed to identify and safeguard individual expectations. However, if the goal is not to secure citizens' expectations about how government officials will wield power, it is no longer clear just what the doctrine is attempting to accomplish. Ensuring rule obedience (that is, administrative compliance with formally-prescribed criteria of decision) has the ring of an unimpeachable objective, but it is not in fact an end in itself. The most obvious reason to care about government's following the rules is the importance of promise-keeping to the rational individual's sense of security, order and predictability in his daily life.<sup>208</sup> A less obvious, though probably related, reason is the importance of promise-keeping to the citizen's sense of his government as an institution with integrity. But to address either of those concerns, the doctrine would have to ask what the rational citizen-individual *thought* his government had promised about how power would be exercised.

A different sort of reason for caring about rule obedience is to safeguard the product of the majoritarian process from bureaucratic subversion. The

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205. Easterbrook, *supra* note 91, at 118.

206. Tribe, *supra* note 86, at 315 (emphasis in original, citations omitted).

207. See, e.g., Mashaw, *supra* note 85, at 439-440 (One of the three "essential elements of due process in a liberal democratic regime" is that "the exercise of democratic decisionmaking must affirm, through majority rule, the equality of citizens as political agents.").

208. See, e.g., Rubin, *supra* note 5, at 1105.

legislature delegates power to an administrative agency in order to accomplish a set of policy objectives; that purpose is foiled if the agency fails to employ procedures capable of accurately implementing the legislative program; when the legislative program is frustrated, the will of the people is frustrated. At first glance this reason is quite promising, for it ties the concern with accurate application of explicit statutory standards back into the larger institutional concerns that led the doctrine to positive law for the meaning of "property" and "liberty." But it withstands no more than a first glance.

Displacing the legislature's own set of procedures with a set constructed by the Court looks a lot less like seemly judicial facilitation of the legislative will than like the most impertinent sort of intermeddling. Altering the process of regulatory decisionmaking inevitably introduces costs and sometimes alters the substantive bases on which officials act, both of which belie judicial deference to choices about resource allocation and value definition made in the majoritarian arena. Specifying the set of procedures that will most appropriately minimize administrative errors hardly seems consistent with a judiciary that abjures, on both philosophical and practical grounds, responsibility for supervising the operations of state and federal agencies. In sum, the pursuit of rule obedience has become an exercise in judicial double-speak. Given the right substantive provisions in a state personnel statute, the same Court that assured us that "the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions"<sup>209</sup> will independently assess a state agency's dismissal processes to see if they permit too many mistaken terminations.<sup>210</sup> Given the right substantive provisions in agency regulations, the same Court that insisted that "[t]he federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States,"<sup>211</sup> will reform the procedures of a state parole board.<sup>212</sup>

Indeed, taken to its logical end, the present doctrine threatens to constitutionalize a broad range of claims that agencies have incorrectly applied their governing statutes or regulations. Specifying a procedure to minimize administrative errors in rule application would be an empty exercise if agency officials remain free to perform the procedural ritual and then decide in a way that ignores the information adduced or employs different substantive criteria. Guaranteeing the integrity of the mandated process implies some residual constitutional concern with how that process is actually implemented.<sup>213</sup> And

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209. *Bishop*, 426 U.S. at 350.

210. *E.g.*, *Loudermill*, 470 U.S. at 542-47.

211. *Meachum*, 427 U.S. at 229.

212. *E.g.*, *Board of Pardons v. Allen*, 482 U.S. 369 (1987); *Greenholtz v. Inmates of Nebraska Penal & Correctional Complex*, 442 U.S. 1 (1979) (in *dicta*).

213. *See, e.g.*, *Superintendent v. Hill*, 472 U.S. 445, 455 (1985) (Disciplinary board's proceedings must contain "some evidence" that plaintiffs had in fact engaged in the conduct for which they were deprived of good time credits: "a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence."). *Cf.* *Jackson v. Virginia*, 443 U.S. 307 (1979); *Thompson v. Louisville*, 362 U.S. 199 (1960) (establishing due process review of sufficiency of evidence in criminal context). *See generally* Gerald Neuman, *The Constitutional Requirement of "Some*

so, after nearly a century of fending off ingenious attempts to challenge official violations of state law through the Fourteenth Amendment,<sup>214</sup> the Court itself may have created the most effective argument for why a state administrator's misapplication of state law presents a federal constitutional question.

In sum, in building a theory of due process around a positive law core, the Court has constructed a doctrine that lacks a coherent purposive focus and stands in tension with the principles and concerns which led it to positive law in the first place. The elements chosen (explicit, specific, mandatory substantive standards) and the elements rejected (institutional practice, common law, background understandings, explicit procedural terms) cannot be rationalized by reference to the importance of either substance or process to the individual, or to his expectations about how official power will be exercised. Even if we ignore the perspective of the individual—a strange thing to do in interpreting the Bill of Rights<sup>215</sup>—the doctrine looks no better from the perspective of government institutions. For the Court to assert complete control over the process by which certain interests are dispensed, and yet simultaneously to forswear both power over how interests are defined and concern with any other sorts of interest, establishes a truly bizarre relationship between the national judiciary and the state and federal political branches. It is as if the Court has drawn a line in the dirt and said, “You don’t have to step over this, but if you do, don’t complain about what happens next.” One might appreciate this strategy as a particularly elegant invocation by the Court of the power, and responsibility, of consent—except that there is no good explanation for either the location of the line or what happens after the legislature crosses it. Moreover, “a line in the dirt” isn’t the right metaphor, for it implies more precision and certainty than current doctrine affords. When judicial intervention turns upon the specificity of substantive standards and, more fundamentally, the distinction between substance and procedure, the image might better be a line drawn in shifting sand. And yet, how can the Court be blamed? At each decision point—the relevance of importance, the function of process, the meaning of accuracy, the significance of individual expectations, the role of statutory procedural terms—the alternative answers appeared no better.

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*Evidence*,” 25 SAN DIEGO L. REV. 631 (1988).

214. See HART & WECHSLER, *supra* note 32, at 1225-1229.

215. Cf. Tracey Maclin, *Constructing Fourth Amendment Principles from the Government Perspective: Whose Amendment Is It Anyway?* 25 AM. CRIM. L. REV. 669 (1988) (Fourth Amendment should be viewed from perspective of individual, not government.).

*C. Utilitarian Balancing*

*"No man's liberty or property [is] safe  
when the court simply asks case by case  
what procedures seem worthwhile and not too costly."*<sup>216</sup>

By the time we reach the final step, determining exactly what process is due, much has been ordained by earlier doctrinal choices. The espoused objective—assuring that (certain) rules governing official conduct are correctly implemented—leads to an analytic focus on identifying and minimizing sources of error. Hence, the *Mathews* formula asks whether the increased accuracy to be anticipated from additional procedures, considered in light of the individual interest at stake, will outweigh the anticipated burden to government of providing the procedures. The adoption of an entitlement framework—a model concerned with “vindication of the private claims of individuals to have what belongs to them under the law”<sup>217</sup>—encourages as the procedural paradigm the formal adversary process in which competing claims of right are traditionally resolved. Thus, the set of potentially invocable procedures assessed through the *Mathews* balance are the familiar components of civil trials.

Not surprisingly, this approach breeds theoretical and practical difficulties that reflect by-now familiar, unresolved, and apparently unresolvable normative dilemmas within the doctrine as a whole.

As a theoretical starting point, a utilitarian balance is deeply troubling. If due process is to mark out and defend a sphere in which the individual is reliably preserved from the demands of the collective, how can the extent of the protection the individual receives turn on some calculus explicitly designed to maximize aggregate welfare?<sup>218</sup> When the claim of the individual is pitted against “the sheer magnitude of the collective interests at stake,”<sup>219</sup> how often will the collective good not predominate? The unnaturalness of using a social welfare balance to set the content of due process protection becomes apparent, critics point out, if we imagine employing the *Mathews* approach to decide what process is due parties in traditional civil adjudication.<sup>220</sup> And yet, the Court’s tacit recognition that due process in the regulatory context must, somehow, be differently understood is grounded in an inescapable reality: Providing mass justice is a staggering task. Although entitlement analysis denies due process protection in many circumstances in which protection seems important, it nonetheless imposes procedural obligations on state and federal administrative programs which process numbers of claims that

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216. Rakoff, *supra* note 49, at 162 (hypothesizing reaction of “typical American lawyer”).

217. Michelman, *supra* note 138, at 127.

218. See, e.g., J. MASHAW, *supra* note 43, at 47; Rakoff, *supra* note 49, at 162-63; Saphire, *supra* note 128, at 155.

219. Saphire, *supra* note 128, at 155.

220. E.g., Rubin, *supra* note 5, at 1138.

dwarf judicial caseloads.<sup>221</sup> As Jerry Mashaw points out, "We surely are not prepared to devote the whole of the national budget to the assurance of the accuracy of all social welfare decisions. The appropriate implementation of positive law is important, but it does not exhaust our demand for a good life."<sup>222</sup> If the Court is to avoid dictating a massive reordering of state and federal fiscal priorities, it must, it seems, weigh individual claims to process against the systemic costs of proceduralization.

To venture into social welfare accounting is, however, to crack the lid of Pandora's box. Once the Court openly acknowledges that process implicates resource allocation, *and* that different levels of procedural protection could be justified according to the balance of individual and governmental interests at stake, it lets loose the swarm of criticism (both conceptual and practical) over ignoring the procedural provisions of positive law. What is the judiciary doing second-guessing the political branches' judgment on how much should be spent to implement a given regulatory program? "If the greatest good for the greatest number is the test for constitutionality under the due process clause, then it is hard to escape the notion that the best evidence of social welfare will always be the judgment of the legislature or its delegate."<sup>223</sup> To engage, at this stage of the analysis, in an inevitably ad hoc and standardless assessment of the importance of the individual interest, and to use that assessment as the basis for restructuring administrative behavior, is precisely the undisciplined judicial interference in local and national governance that the Court embraced entitlement analysis to avoid.

Even if there were conceptual justification for the *Mathews* balance, the practical problems of conducting it are insuperable. Jerry Mashaw has extensively demonstrated the shortcomings of the Court's application of the calculus in *Mathews* itself.<sup>224</sup> His work is illuminating, but that level of detail is not necessary to appreciate the impossibility of the task *Mathews* sets. How can the Court predict the number of errors that would be avoided by, for example, permitting the individual to present oral testimony? Or the cost to the government that would be entailed? Although in theory quantifiable, these factors cannot, realistically, be quantified.<sup>225</sup> Moreover, the analysis shares with all cost/benefit assessments the tendency to overlook, or at least underrate, "soft" variables.<sup>226</sup> The government's interest, for example, is reduced to conserva-

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221. "In 1984, the Social Security Administration made 337,459 dispositions. In 1984, federal trial judges disposed of 243,000 civil cases and 44,501 'defendant dispositions' [i.e. criminal cases]." Judith Resnick, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405, 427 n.110 (1987) (citations omitted).

222. J. MASHAW, *supra* note 43, at 106.

223. *Id.* at 152. Accord Easterbrook, *supra* note 91, at 110.

224. See J. MASHAW, *supra* note 43, at 115-40; Jerry Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28 (1976).

225. The Court seems to concede this in *Mathews* itself, where it gave short shrift to reversal rate statistics proffered—with conflicting interpretations—by the parties. See text accompanying note 38 *supra*.

226. Mashaw, *supra* note 224, at 48. See generally Laurence Tribe, *Policy Science: Analysis or Ideology*, 2 PHIL. & PUB. AFF. 66 (1972).



tion of the fisc. There seems no way to account for the possibility that government might share with the citizen, to at least some extent, an interest in decisional processes that seem fair, rational, and careful—and hence legitimate and acceptable—even if (or perhaps, precisely because) they cannot be infallible.

The present approach, it seems, yields nothing but harm. Perhaps because a utilitarian calculus is so vulnerable to theoretical and practical attack, the Court rarely concludes that the *Mathews* balance tips in favor of substantial pre-deprivation process. Thus, it often inadequately protects those interests that do make it past the entitlement gatekeeper.<sup>227</sup> At the same time, to the extent that process *is* imposed, the importation of strands of the formal, adversarial, judicial hearing into the administrative setting can be useless, and even destructive. *Goldberg*'s mandate of evidentiary hearings prior to termination of welfare benefits has become the classic example. Mashaw points out that most recipients lack the resources to utilize hearings and that, in any event, many of the errors made in the program are not addressable through this sort of process.<sup>228</sup> Moreover, the emphasis on more formal, adversarial procedures has changed the nature of the interaction between officials and benefit recipients in ways that many observers find disturbing and counterproductive.<sup>229</sup> The pre-*Goldberg* regime may have been an intrusively paternalistic one, but the new regime of assembly-line hearings stamped out by at-best-indifferent bureaucratic adversaries hardly seems a brave new world worth discovering.

Hence, this last component of contemporary due process analysis exhibits the unsoundness that afflicts the doctrine as a whole. It is simultaneously underprotective and overintrusive, useless and harmful, incoherent and inevitable, in need of remedy and irremediable. Mashaw, one of the most dedicated contributors to the effort to craft the procedural due process jurisprudence of the administrative state, best describes where we now find ourselves:

If positive law does not provide the identification and relative value of interests, what does? If process promotes something other than accuracy, what is it? And, if the Court is to balance interests without becoming utilitarian, or perhaps to eschew interest balancing in favor of rights enforcing, exactly how is it to go about these things in a coherent and acceptable fashion?

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227. See, e.g., L. TRIBE, *supra* note 50, at 673-74, 710.

228. J. MASHAW, *supra* note 43, at 33-36. The way to improved agency performance, Mashaw argues, is not adversary hearings but better administrative management. *Id.*

229. See, e.g., William Simon, *The Invention and Reinvention of Welfare Rights*, 44 MD. L. REV. 36, 36 (1985) (hereafter Simon, *Invention and Reinvention*); William Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983) (hereafter Simon, *Legality, Bureaucracy, and Class*). See also Lucie White, *Subordination, Rhetorical Survival Skills and Sunday Shoes: Notes on the Hearing of Mrs. G*, 38 BUFF. L. REV. 1, 32-34 (1990) (describing recipient's reluctance to invite administrative retaliation by invoking hearing rights).

There are no answers to these questions in the contemporary jurisprudence.<sup>230</sup>

### III. ORIGINS

*"[W]e are what we have made ourselves . . . ."*<sup>231</sup>

I have retold the story of contemporary procedural due process jurisprudence in order to reveal something that has been hard for us to see.

Due process is the constitutional mouthpiece through which we voice a multitude of anxious questions about the sort of society we are, and are becoming. When an individual complains that a government official harmed him through a process that seemed callous or unfair, he calls for an illumination of the relationship between citizens and the state in a world in which this relationship is increasingly critical to each citizen's ability to survive and prosper.<sup>232</sup> When procedural due process doctrine reveals itself so incapable of generating satisfying answers to this call, we are tempted to blame the Court for stupidity, stubbornness, or shortsightedness. If only the justices would pay attention to what the critics are saying; if only they would just "fix" procedural due process. What the story of the last twenty years shows is that the conceptual and practical problems we perceive throughout the doctrine cannot be traced to some bungling that, with greater judicial attention, effort or humility, could be fixed. At every turn, the Court did choose badly—but only to avoid choices that appeared as bad or worse. Where we find ourselves is not a matter of carelessness or happenstance. Where we find ourselves, unfortunately, makes complete sense.

If we are to find our way out of this dilemma we must, paradoxically, go still more deeply into it. We must look past the apparent welter of disagreement to see that the doctrine and its various critiques are all born of a common vision. It is this shared conceptual framework that has, until now, generated the goals we have set for ourselves, the range of solutions we have deemed possible, and the criteria by which we have judged doctrinal choices to be "good," "bad," or "worse."

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230. J. MASHAW, *supra* note 43, at 154.

231. DOROTHY DINNERSTEIN, *THE MERMAID AND THE MINOTAUR* 22 (1977).

232. In speaking, here and henceforth, of "citizens," I do not intend any implied exclusion of resident aliens. The status of aliens has historically been a complicated and unhappy corner of due process law, and it is beyond my purpose to confront it in this article.

A. *Images*

*"At any point in time,  
we are one whose identity is constituted  
by a tale."*<sup>233</sup>

The legal magi of legend have always known the secret strength of metaphor.<sup>234</sup> For the rest of us, that knowledge comes harder. We have to struggle to recognize the power of the images we invoke, their two-faced tendency to constrain as well as facilitate, to construct as well as be constructed by, our thinking. We have to work at understanding the pictures through which we have become accustomed to understanding the world.

Behind the frustrated tangle of doctrine and criticism that is procedural due process stand two powerful images: *entitlement* and *largess*. "Entitlement" is the more familiar of the two, for it is image become doctrine itself. We know it as the trigger, the test, the brass ring the plaintiff must be able to grab if he wants to stay on for the next round. Its role as *doctrine* disguises and, simultaneously, enhances its potency as *image*; like the critical clue in a mystery story, it is the commonplace object hiding in plain view. "Largess" also exercises conceptual power from hiding, although it is concealment of a different sort. The word plays no part as doctrine; except for a single mention in one dissent,<sup>235</sup> it does not appear in the Court's procedural due process opinions. It is, however, the normal discourse of the commentary. Benefits, jobs, licenses, statuses, all the activities and services that are the potential objects of due process claims are known collectively as "government largess." The usage is ubiquitous and unself-conscious, a subliminal message conveyed in the accounts of commentators of all political and jurisprudential persuasions.<sup>236</sup>

Strong words, "entitlement" and "largess" paint vivid pictures of the relationship between the people and their government. The image of "entitlement" is the image of the individual peremptorily asserting his claim to have

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233. SEYLA BENHABIB, *CRITIQUE, NORM, AND UTOPIA: A STUDY OF THE FOUNDATION OF CRITICAL THEORY* 349 (1986).

234. *See, e.g.*, *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (Cardozo, J.) ("Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.").

235. *Goss*, 419 U.S. at 599 (Powell, J.).

236. *See, e.g.*, J. MASHAW, *supra* note 43, *passim*; Rabin, *supra* note 108, *passim*; Saphire, *supra* note 128, *passim*; Smolla, *supra* note 50, *passim*; Van Alstyne, *supra* note 124, *passim*; Alexander, *supra* note 173, at 1560; Terrell, *supra* note 4, *passim*.

You might consider whether you remarked the usage of the word, several times, in the first half of this article. Curiously, members of the Court use "largess" frequently, *outside* the area of procedural due process, to describe government benefits and services. *See, e.g.*, *Harris v. McRae*, 448 U.S. 297, 334 (1981) (Brennan, J., dissenting) (Medicaid); *Califano v. HEW*, 443 U.S. 76, 84 (1979) (employment-related benefits); *Kahn v. Shevin*, 416 U.S. 351, 361 (1974) (White, J., dissenting) (widows' tax exemption); *Norwood v. Harrison*, 413 U.S. 455, 462 (1973) (aid to schools); *Wyman v. James*, 400 U.S. 309, 327 (1970) (Douglas, J., dissenting) (welfare).

rendered to him what is rightfully due and owing. He stands at the focal point, his posture one of demand, his tone one of righteous indignation. He is radiant with moral force. He seeks the restoration of the proper order of things, an order that has been disrupted by the stupidity or venality of figures (bureaucrats, one gathers) lurking in the shadows. The image of "largess" is the image of a potent magnate dispensing favors, a public Lord of the Manor moved by noble and generous condescension to do good works. Moral weight, as well as power, lies with this central figure; the people in the shadows are merely the objects of its charitable impulses. Their only appropriate response is eager gratitude; for them to thrust forward and make a claim would be a shocking display of spiritual degeneracy or social deviance.<sup>237</sup>

That these should be the images that have dominated our thinking about procedural due process is remarkable in two respects. First, neither image seems to be a good representation of how we citizens actually experience the role of contemporary government. The entitlement picture is too grossly peremptory. It does not hold true across the range of activities in which government engages. We are likely, for example, to think about the category of government jobs differently than we think about the category of government benefits. Adding even greater complexity, our reactions vary within category. Access to public kindergarten feels different than access to public graduate school, just as we think differently about driver's licenses than about liquor or broadcast licenses, about administration of a public library than about a prison or mental health facility, about veterans benefits than about disaster relief or farm subsidies. We could doubtless identify certain characteristics of government-citizen relationships that affect our response across categories—importance, scarcity, voluntariness, and blameworthiness come immediately to mind—but their interaction is complicated. Rarely do we see a simple picture in which it is the rightful prerogative of the citizen to demand the good or service, and the correspondingly absolute duty of the public official to provide it.

At the same time, the largess picture is, if anything, even less true to our felt experience. We may not think of health benefits, liquor licenses, teaching jobs or parole as things that "belong" to the citizens who seek them. But neither do we think of them as things that "belong," absolutely and without qualification, to the government from which they are sought. Certainly we do not understand them as charity dispensable at the whim of public officials. Indeed, only the common currency of the largess image could desensitize us to its startling inappropriateness. To describe as "largess"—the "liberal giving to or as if to an inferior"—the array of opportunities and services our govern-

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237. If this picture of "government largess" seems too fanciful, consider the definition of "largess" offered by Webster's New Collegiate Dictionary: "(1) liberal giving to or as if to an inferior; (2) excessive or ostentatious gratuities; (3) an innate generosity of mind or spirit." Charles Reich is apparently the source through which the term entered our due process consciousness. He appears to have used it deliberately, with full awareness of its unpleasant connotations. See, e.g., Reich, *supra* note 78, at 733, 770.

ment provides its people out of public funds betrays an almost feudal mindset, a worldview that antedated the ascendance of democracy.

The second remarkable thing about the two images is their disparateness. "Entitlement" and "largess" could not be more wildly contradictory representations of the dynamic of power and moral standing in the welfare state. Yet they coexist in due process jurisprudence. But, you might object, this is easily explained—indeed, the answer also helps resolve how our legal imagination could be dominated by two images that so poorly fit our experiences as citizens. Law often sees the world as divided into winners and losers, those who have the right to control and those who lack it, things that are property (and therefore cannot be withheld without due process) and things that are not, rights and privileges, entitlement and largess. Even though neither image by itself is an "accurate" picture of our understanding of the relationship between citizen and modern government, they work in tandem; their exaggerated oppositional features convey, like a pair of good caricatures, important legal truth. I will come back to this point,<sup>238</sup> but for the moment let me offer simply a factual response: We have not used the two images as the either/or of a central constitutional dichotomy, the heads-or-tails of the coin of due process. Whether describing what the Court has done or prescribing what it ought to do, we repeatedly talk—seemingly deaf to the dissonance—about creating entitlement *in* (or *to*) government largess.<sup>239</sup>

If the images of "entitlement" and "largess" jar with how we would instinctively describe the relationship between citizens and modern administrative government, why did they emerge as the dominant pictures? And why do we hold on to them, conjoining them in a way—"entitlement in largess"—that seems to condemn our thinking, from the very outset, to incoherence as well as inaccuracy? The explanation, I believe, is that behind the images stand a set of assumptions about people, power, government, and law; assumptions that are familiar objects hiding in plain view; assumptions that are the subliminal message in the accounts of courts and commentators.

I emphasize that my claim, with respect to these assumptions, is essentially an inductive one: Given the procedural due process jurisprudence we have developed in the last two decades, they appear to be the underlying assumptions about human nature, society, the state, and law that would generate such a doctrine and set of critiques. This is *not* a claim that the judges and commentators who have shaped the jurisprudence consciously hold or would enthusiastically endorse these assumptions.<sup>240</sup> And it *certainly* is not a claim that these

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238. See *infra* text at pp. 244-46.

239. E.g., Smolla, *supra* note 50, at 79, 98 ("From what source of law are entitlements to largess to be derived . . . ?"; "Roth accepted the premise that 'rights' or 'entitlements' in largess had no a priori existence."). Cf. Rabin, *supra* note 108, at 74 (Recent cases "do not go far enough in recognizing a property interest in government largess.").

240. I have, however, included (in this and in the preceding section) statements that seem consistent with holding or endorsing these assumptions—or at least that appear to accept them as the descriptive and normative premises of the jurisprudence.

assumptions correspond to what we know from our lives with family, friends, and fellow citizens. Indeed, to the extent that we (those who have shaped the discourse to date, and those who can shape it in the future) feel impelled to distance ourselves from these assumptions—perceiving a dissonance between the world as we experience it in our daily lives and the world as they posit it to be—we create the space in which to begin to imagine a very different procedural due process jurisprudence.

### B. *Assumptions*

*"[T]he definition of the problem  
sets the answer."*<sup>241</sup>

*Begin with an assumption about human nature:* Man's most significant characteristics are his autonomous individuality and his rationality. Essentially separate from others, he comprises a unique constellation of needs, interests, and desires not shared (perhaps, not even knowable) by others. He experiences the fullness of his humanity when he brings to bear, upon questions of ends and of means, his capacity for reasoned decisionmaking. Hence, what he requires to flourish is the freedom to define and pursue his own vision of the good life, unsubjected by other, competing visions. For him, independence is the desire and the requirement of full human personhood; the rational exercise of choice is the substance and the sign of full moral agency.

*Which leads to an assumption about society:* For this autonomous, rational individual, others are at least potentially dangerous. Each of them will be pursuing a particular conception of the good life. Even among men of good will, those conceptions will often be indifferent, if not actively hostile, to the realization of his vision—and he would be foolhardy to trust to an abundance of good will. Because each of the others' constellations of interests and desires is idiosyncratic and practically (if not fundamentally) unknowable to him, he can never be certain if, when, or from where the danger will materialize.<sup>242</sup>

To mitigate this insecurity he reaches for a tenuous solution. The one common ground upon which he and others can meet is the human capacity for rationality. This quality will not be sufficient to enable them to attain a shared vision of the good life, at least beyond some fairly basic and limited point. The constellations of interests and desires are simply too mysterious, varied, and subjective. However, the others, as rational actors, should consent to a set of rules that guarantees the freedom of each to pursue his own vision of the good so long as that pursuit does not interfere with the reasonable freedom of others.

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241. *Feminist Discourse, Moral Values, and the Law—A Conversation*, 34 BUFF. L. REV. 11, 47 (1985) (remarks of Carol Gilligan) [hereinafter *Buffalo Symposium*].

242. See, e.g., BRUCE ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 3 (1980).

One of these rules is that every individual is acknowledged as the equal of every other. This primary rule of equality generates a subsidiary rule: No individual's conception of the good may be privileged over any other's.<sup>243</sup> Another and related rule is that obligations toward others which entail action contrary to the individual's own desires should be imposed only if he has consented, in some manner, to undertake those obligations.<sup>244</sup>

*Which leads to an assumption about the state:* For the aggregate of autonomous, rational individuals, the state is both necessary and dangerous. The state must exist in order to secure the conditions within which the individual may pursue his vision of the good life.<sup>245</sup> At the most basic level, government guarantees material security, policing the boundary between the individual's sphere of autonomy and others who might attempt to invade that sphere. Additionally, government guards the integrity of the framework of consensual interchange, maintaining conditions within which individuals can engage in mutually satisfying, voluntary relationships and exchanges. By thus safeguarding the freedom of each individual to pursue his own interests as he perceives them, government promotes the autonomy and self-fulfillment of each citizen and hence the good of society as a whole.

The state is dangerous because the power required to safeguard individual freedom may just as readily become an instrument of individual domination. Ceding power to another is always perilous.<sup>246</sup> Power in the hands of government is a two-fold danger: It may be seized to serve the ends of individual government officials or private individuals acting in collaboration. This danger has intensified as industrial and technological advances render human existence more physically and economically interrelated. Protecting the individual against specific predatory incursions of others and maintaining the framework of voluntary interchange may no longer be sufficient to secure the conditions within which his freedom can be realized. Some individuals will lack, through no circumstances that could be attributed to their voluntary choice, the minimal resources necessary to experience autonomous personhood. Thus, the state must increasingly be prepared to supply, as well as to safeguard, the material conditions of human freedom. This will require taking resources from some individuals for redistribution to others. Official power, and hence opportunities for its misuse, proliferates. With every act of redistribution undertaken to enhance the autonomous personhood of some individuals, the state teeters precariously on the edge of thwarting other individuals' autonomous pursuit

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243. See, e.g., J. MASHAW, *supra* note 43, at 224 (quoted *infra* note 259).

244. See, e.g., *id.*, at 224-25 ("There are essentially two techniques through which the state may exercise power, while avoiding the legitimation of personal domination. The first is *consent*; the second, the use of *impersonal rules* or principles.").

245. Some voices within the procedural due process commentary would say this is far too positive a description of the state's role. E.g., Terrell, *supra* note 4, at 354-56 & n.10. See also *infra* note 254.

246. "From the individual's point of view, it is not any particular kind of power, but all kinds of power, that are to be feared." Reich, *supra* note 78, at 774.

of their own conceptions of the good life.<sup>247</sup>

*And an assumption about law:* Law is the instrument which accommodates the multifarious, potentially exploitive actions of autonomous, preference-pursuing individuals by providing forms and processes to control conflict. Through the institution of rights, law marks out zones within which the individual is free to pursue his own conception of the good, and across the boundaries of which further satisfaction of his desires is a matter of consensual arrangement with other rights-holders.<sup>248</sup> The precise location of these boundaries will rarely be objectively demonstrable or self-evident. Hence the legitimacy of law's content generally depends upon the consent of affected individuals, obtained either directly through their participation in law-making or constructively through their assent to institutions of law-formation.<sup>249</sup>

To fulfill its function most completely, law should possess certain formal characteristics. It should be general, impersonal, and objective to ensure equal treatment of autonomous individuals, none of whose conceptions of the good must be subordinated to any other's.<sup>250</sup> It should be determinate, stable, and calculable to permit the fullest experience of liberty by allowing the individual confidence of its boundaries.<sup>251</sup> It should be comprehensible and predictable to enable the individual to engage in the rational decisionmaking which is his quintessentially human characteristic.<sup>252</sup> Even when law fails to forestall conflict, these formal attributes contribute to its success as a conflict-dampening device. When preference-pursuing individuals collide, their dispute (structured as competing claims of right) is most likely to be resolved acceptably if, after full opportunity for adversarial joining, winner and loser are declared by a third party not on the basis of his own values, but rather through the rational, objective application of recognizably impersonal, determinate, stable rules.<sup>253</sup>

These assumptions are not unfamiliar. They closely correspond to what others have characterized as the classic premises of liberal legalism.<sup>254</sup> To

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247. See Michelman, *supra* note 55, at 1334-37; Cass Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437-46 (1987) (both tracing ideological evolution from night-watchman to welfare state).

248. "The rules thus have a double aspect. By their very effect of staking out the limits of each person's guaranteed freedom, they also stake out zones of autonomy wherein each is protected from exposure to unpredictable, arbitrary or discretionary interference by others." Michelman, *supra* note 138, at 129.

249. See, e.g., J. MASHAW, *supra* note 43, at 224-25; Michelman, *supra* note 138, at 129.

250. See, e.g., J. MASHAW, *supra* note 43, at 267 (urging "the impersonality of rules as a safeguard against domination, as a means for maintaining the social preconditions of individual moral agency").

251. See Michelman, *supra* note 177, at 1472 ("a formally rational law designed to liberate as it organizes and orders").

252. "Absent transparency and comprehensibility . . . the possibilities for rational planning and independent moral agency vanish." Mashaw, *supra* note 85, at 439-40.

253. "Thus the role of rendering decisions in formal procedures—which we can call the judicial role—must consist of deciding in accordance with criteria external to, and capable of contradicting, the judge's own Olympian or managerial view of what is best." Michelman, *supra* note 138, at 130.



discover that they dominate procedural due process jurisprudence would not be at all surprising. Many would say they are the reigning assumptions of our entire legal system. Of course our thinking about due process originates in liberal-legalist assumptions. Why wouldn't we begin here? Where else would we begin?

The case against beginning here is, I hope, becoming clear. The jurisprudence we created has failed, conceptually and practically. Twenty years of trying to fix it has proven it to be incorrigible. We were quick to see the failure. We are slower to recognize the incorrigibility. We will be free to move forward only when we see the connection between this incorrigible failure and the set of assumptions from which we started and within which we have attempted reform. Seeing that connection begins by considering again the two images, entitlement and largess.

What is to be expected when a human subject whose nature is essentially solitary and self-contained, and whose primary motivation is the determined pursuit of his own needs and desires, interacts with another such subject? Perhaps, his interests will parallel those of the other, and cooperative action will be born of coincidental self-interest. If, however, interests do not so fortuitously coincide, then only a limited range of outcomes can be anticipated. The individual might attain a position of power, from which he is able to compel the other to yield to his wishes. Or, the individual might find himself in a position of subordination, in which he is at the mercy of the other's whim. The premise that actors are autonomous and egotistic allows us to imagine few patterns in between. In an encounter with another over a mutually-desired resource, one emerges either in control or under control, with the advantage or at a disadvantage. Now, imagine the possible patterns of interaction between citizen and government over the resources of the welfare state. Two pictures emerge: entitlement and largess.

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254. See generally Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7 (1989); Christine Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751 (1989) (reviewing CATHARINE MACKINNON, *FEMINISM UNMODIFIED* (1987)); Deborah Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Simon, *Invention and Reinvention*, *supra* note 229; Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); ALISON JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* (1983).

By using the label "liberal legalism," I do not mean to deny liberalism's status as a broad political-philosophical tradition that cannot be reduced to a single, uniformly-endorsed set of assumptions. See generally J. MASHAW, *supra* note 43, at 183-99; Steven Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103 (1983). Many legal scholars who place themselves (or who are placed) within that tradition obviously depart in significant ways from the assumptions that have been dubbed "liberal-legalist." See, e.g., L. TRIBE, *supra* note 50; KENNETH KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989); Kenneth Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; STEVEN SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* (1990). Cf. Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1566-71 (1988) (advocating "liberal republicanism"). The scholarship devoted to procedural due process, however, has stayed remarkably close to what might be called a liberal-legalist mainstream. Indeed, it has been moved by strong currents of libertarianism which (in their Hobbesian origins) would demand an even bleaker account of human nature and a far harsher picture of human society and the state than I have incorporated into my relatively benign statement of the assumptions.

These two pictures, entitlement (the image of control) and largess (the image of subordination), represent the *possible* dynamics in an encounter between the citizen-individual and the government-other. Which of the two is the *appropriate* dynamic—which, to put it somewhat differently, is the image towards which procedural due process doctrine ought to strive—cannot be known without consulting some normative reference point outside the pictures themselves. Within the set of liberal-legalist assumptions, the truest, best such reference point is consent, the distribution of obligation through the voluntary choice of rational actors. And two theories of consent appear, initially at least, to favor the individual-empowering dynamic of entitlement.

The first theory invokes the metabargain through which individuals came together and formed society. The state created in this agreement received power only so that the freedom of the citizen-individual might be maximized. To understand the origin and purpose of government in this way compels us to reject the image of largess, in which citizens occupy a condition of dependence, a condition that is the antithesis of individual freedom and, indeed, of full human personhood. To lack the power of self-determination, the control over one's environment, and the ability to make and implement choices is to be less than human.<sup>255</sup> Indeed, it is precisely the goal of curing dependence, of providing the material base from which citizens can realize the independent self-direction of fully human actors, that (within liberal-legalist assumptions) most securely justifies governmental redistribution of individual wealth. Under the terms of the metabargain, then, the citizen-individual might legitimately demand from government that which government may justly possess only in order to secure his freedom. He might be regarded as "entitled to" the resources amassed by the welfare state. But the triumph of entitlement, through this reasoning, is a pyrrhic one. The posture of demand can be achieved only from the condition of helplessness. The citizen-individual attains the focal position of power in the picture of entitlement only by first demonstrating that he is one of the powerless dependent who crouch in the shadows of the picture of largess. In a world that cherishes autonomy and self-command, it is hard to hear the demand of one whose peremptory voice originates in helplessness, defectiveness, and failure.

An alternative way in which consent could be said to support the dynamic of entitlement over largess involves the more transient societal bargains that are ordinary legislation. The benefits, jobs, licenses, and statuses created

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255. The issue of dependency in particular is a perennial and poignant problem for liberal politics. For many forms of dependency seem to demand a paternalistic control that liberal autonomy rejects. To rationalize paternalism within a liberal polity, paternalism must be presented in therapeutic, rehabilitative, or educational forms that promise only temporary limitation of individual autonomy, a reversion at the earliest possible moment to self-command, and necessary assistance in making the transition.

J. MASHAW, *supra* note 43, at 249-50. The most powerful expression of foreboding remains *The New Property*, in which Charles Reich worried, "What will dependence do to the American character?" Reich, *supra* note 78, at 771.

through those laws could be seen as obligations undertaken by the state. The individual would-be beneficiary could not have demanded that such promises be made in the first instance. They are explained and justified by nothing more, or less, than that they are the present confluence of citizens' interests and desires (expressed through representatives). Nevertheless, once these promises have been made, the individual might be said to be "entitled" to demand that they be honored. But once again, the case for choosing the entitlement picture is unstable. Once again, the first step is largess—here, the beneficent whim of the majority. This is demand springing forth from gratuity, an order predicated on a promise that could not have been commanded. In a world that prizes voluntary choice as the fountainhead of obligation, it is hard to hear such a demand without fearing that those who promised have been pushed beyond their undertaking, and that those who benefit will eventually try to claim that the promise itself was required.

In this way, having first generated the dichotomous images of entitlement and largess, liberal-legalist assumptions then spawned the freakish hybrid of "entitlement *in* largess." This is the picture of the opportunistic beggar extorting payment by flaunting his wretchedness, or of the spoiled donee imperiously demanding delivery of his gift. It is the most unsavory picture of all. Is it any wonder that the jurisprudence built around this unhappy image is deeply conflicted? Consider again the story of procedural due process, this time hearing the relentless compulsion of its generative assumptions.

### C. Jurisprudence

*"The kings had made a monster  
that devoured them."*<sup>256</sup>

If law is conceived as the instrument through which autonomous selves protect themselves against the acquisitive behavior of others, then the Due Process Clauses become the promise of Ultimate Law. The pledge of "due process"—process that is owed or owing as a debt, as a natural or moral right<sup>257</sup>—reassures the citizen-individual that he will not be relegated to the caprice of others for the treatment he receives. Here is process proclaimed as *right*, and a right is a powerful possession, a zone of noninterference, "a loaded gun that the rightholder may shoot at will in his corner of town."<sup>258</sup> In addition, this process is attached to "liberty" (the condition of freedom, from domination of other wills, that is the natural and desired state of the

256. CHARLES REMBAR, *THE LAW OF THE LAND: THE EVOLUTION OF OUR LEGAL SYSTEM* 212 (1980).

257. The primary definitions of "due" in WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 387 (1988).

258. Roberto Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 597 (1983).

individual)<sup>259</sup> and to “property” (the material circumstance that realizes this freedom, the safe base that enables you to deal, from strength, with the threat posed by individual and collective others).<sup>260</sup> In one constitutional cluster, the central icons of liberal-legalist ideology come powerfully together, and the constitutional meaning seems clear and vivid.

However, when we invoke due process, thus conceived, to help us define the relationship between citizen and the modern regulatory state, all that ideological power works against us, confusing and obscuring what had appeared so clear. The need seems to be compelling—Charles Reich vividly portrays the citizen losing himself in the maw of collective power and individual dependency that is the welfare state—but none of the implementing concepts now make sense. If “property” is the bulwark of individual autonomy against the other, the desideratum of private limitation on collective power, how can it help us think about an individual’s claim to a benefit, license or other share of public resources? It is like demanding from me the space that gives you room to defy me. If “liberty” is liberation from the oppression of the other, how can it help us understand an individual’s claim for employment, status, or other relationship with government? It is like demanding that I assist you in being left alone. If “*due process*,” process as right, is a loaded gun that the holder may shoot at will in his corner of town, aren’t you demanding that I hand you the gun with which you will then shoot me down? Or, better, hold me up—for the propinquity of the takings clause underscores that resources demanded by individuals from government today are resources taken from individuals by government tomorrow.

For a Court trying to create a doctrine that simultaneously promotes each citizen’s quest for autonomous self-fulfillment and protects each citizen from the natural tendency of all others to maximize their share of available resources, there could be, in the end, no choice but the positivist trap. The reality of redistribution could not be denied. The benefits and statuses clamoring for protection as the new property and liberty were inescapably someone else’s traditional property and liberty transmuted. The Court could not find consent to the creation of these new rights/demands in the Due Process Clauses themselves—at least not through any interpretive process that met the liberal-legalist ideal of adjudication as a process of rationally noncontroversial reasoning from neutral principles. There was no place left but simple-majoritarian positive law, and the enforcement of whatever obligations have been undertaken there.

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259. Cf. J. MASHAW, *supra* note 43, at 224 (“Let us begin by restating the basic value of *liberal* governance in terms of a general prohibition: State power shall not be used to subject any person to the will of another.”).

260. Outside, [the individual] must justify or explain his actions, and show authority. Within, he is master, and the state must explain and justify any interference. . . . Thus, property performs the function of maintaining independence, dignity and pluralism in society by creating zones within which the majority has to yield to the owner.  
Reich, *supra* note 78, at 771:

However, just as (given liberal-legalist assumptions) this solution was inevitable, so was it inevitably unacceptable. If the protection of due process depends on the content of ordinary law, the individual will find himself at the mercy of a majority of egotistic, preference-maximizing others—the very position from which the constitutional right was to secure him.<sup>261</sup>

Reaction within the commentary was, accordingly, vehement and deep. Of all the proffered strategies for escaping the positivist trap, the boldest and most promising was dignitary theory. Its promise lay in its determination to supplant the “possessive, privatistic” view of process as an instrument to obtain public resources<sup>262</sup>—a view that labored under the conceptual dyslexia of “entitlement in largess”—with a “communal, interpersonal” vision of process as interaction between the citizen and his government.<sup>263</sup> Frank Michelman explained, “The [former] perspective is that of the isolated individual interested in getting what is his, while the [latter] perspective is that of a group member interested in his relationships with fellow members of the group.”<sup>264</sup> But within the governing ideological framework, the transformation sought by dignitary theorists simply was not possible.

In good liberal-legalist fashion, these theorists assumed that human dignity resided in the distinctively human capacity for rational thought.<sup>265</sup> From here it was but a short step to Kant for the ideal of a dignity-affirming process: “To treat anyone as a mere means is to deny the importance of his ends in life [*viz*, No citizen’s conception of the good may be privileged over any other’s] and, at the same time, to undermine his basis for self-respect” [*viz*, The individual experiences himself as fully human only when he can exert control over himself and his environment, not when he is directed by some external will].<sup>266</sup> This ideal would be realized through procedures that epitomized rational discourse: *revelation* by the decisionmaker of the grounds for action and *participation* by the individual in the form of responsive information and argument. These procedures would embody rationality, by enabling the individual to comprehend what is happening and to work at averting the threatened harm. Moreover, by preventing the decisionmaker from denying the individual’s status as an autonomous, equal will, they would constitute the citizen’s

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261. “[I]t makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority.” J. ELY, *supra* note 79, at 69.

262. Michelman, *supra* note 138, at 128.

263. *Id.*

264. *Id.* at 130-31.

265. See, e.g., Saphire, *supra* note 128, at 119-20. Although dignity may have a nonrational psychological dimension, any attempt to pursue affective satisfaction would be intolerably indeterminate, plunging the constitutional inquiry into the chaos of subjectivity. See, e.g., Mashaw, *supra* note 224, at 50. See also J. MASHAW, *supra* note 43, at 171 (“This analysis should not be confused with a *psychological* analysis of the state of mind or well-being of individuals . . . . We are not exploring what processes make people *feel* dignified or have self-respect.”) (emphasis in original). Rational cognition was the only acceptably universal and objective starting point.

266. The language in brackets is mine; the underlying quotation is from J. MASHAW, *supra* note 43, at 195.

proof against being disposed of by his government as a less-than-human thing.

In this way, having set out to envision an alternative to process as privatistic, possessive and peremptory, dignitary theory came round full circle. All that had changed was the name of that to which the self-contained, self-centered citizen-individual lays claim. Listen to this description of how the dignitary conception of process (here called "nonformality") is thought to differ from the conception of process as an instrumentality to obtain desired things ("formality"): "It might be said that formality is the standpoint of an individual momentarily regarding others solely as means to his ends, while nonformality is the standpoint of an individual *steadfastly demanding* to be treated as an end and not solely as means."<sup>267</sup> For the self of liberal legalism, there can be no escape from privatism, no interchange with another that is not peremptory and possessive. Dignity means preserving self inviolate from others. Relationship means mutually acceding to the demand to be treated as an end—a fragile truce made possible not by growing trust, but by new-found modes of verifiability. The process which results is "interpersonal" only in that each confirms the other's right to egotistic separateness. It is "communal" in a world where "[c]ommunity consists in this: that no one can rightly complain of being *used* by another."<sup>268</sup>

And even if dignitary theorists imagined a more generous, responsive and compassionate relationship among persons and between the citizen and his government, they were forced to concede that it could never be attained through the mechanism of due process.<sup>269</sup> In this world, law vindicates separation. A claim of right to dignity-affirming procedure *concedes* the absence of connection: "To stand on one's rights is to distance oneself from those to whom the claim is made; it is to announce, so to speak, an opening of hostilities; it is to acknowledge that other warmer bonds of kinship, affection and intimacy can no longer hold."<sup>270</sup> Courts preside over these hostilities, channeling the adversaries through rituals which, if conducted properly, result in victory without violence.<sup>271</sup> Law could not change the nature of the self-sufficient, egotistic combatants that come before it. Indeed, for it even to attempt to do so would be the grossest invasion of individual autonomy.<sup>272</sup> Thus dignitary theorists reluctantly concluded that even if the citizen-individual could imagine desiring from his fellows something other than possessive, privatistic satisfaction, law could not assist him in achieving it.<sup>273</sup>

267. Michelman, *supra* note 138, at 131 (emphasis added).

268. Pincoffs, *supra* note 132, at 179 (emphasis in original).

269. *Supra* notes 157-58 and accompanying text.

270. Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625, 628 (1988).

271. Or, rather, without a level of violence we find unacceptable. See Robert Cover, *Violence and the Word*, 95 YALE L.J. 1601 (1986) [hereinafter *Violence and the Word*]; Robert Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

272. See, e.g., J. MASHAW, *supra* note 43, at 200 ("I do not believe that fraternity can be mandated by law without an unacceptable loss of individualist liberal values.").

273. See *supra* notes 157-58 and accompanying text.

Still, so disturbing was the danger from the collective other represented by the positivist trap that the accomplishment of freestanding, uncontingent rights of revelation and participation—limited as they concededly are—would have been no small victory for dignitary theory. But because even this theory rested upon a peremptory, proprietary rationale for process, it ultimately collapsed upon itself. Two hypothetical liberal-legalist selves might choose to accede to each other's demands for process that both constituted and verified respect for self-centered rationality. Within the mutuality of such a compact, neither could rightly claim that he was being used as mere means.<sup>274</sup> In fact, however, the government official-individual whose thought processes and attention were being requisitioned had not consented to honor such a demand. Coercive revelation of his reasoning processes would simply reverse which individual was reduced to means towards another's ends.<sup>275</sup> Thus dignitary theory found itself stymied by that most powerful of liberal-legalist touchstones, consent.

The power of consent to confound the creation of an acceptable due process jurisprudence did not end with the defeat of dignitary theory. Having thwarted our efforts to escape the positivist trap, it then posed the painful conundrum of "the bitter with the sweet." So long as positive law specifies the process to be afforded, in advance and in terms that the rational citizen-individual can apprehend, does not the act of seeking the benefit constitute acceptance of the terms on which it is offered? That some might call those terms undesirable or undignified does not negate the presence of choice; it simply confirms the mysterious multiplicity of individual needs and desires. From the ideological commitment to allowing the individual to pursue his own ends, regardless of what others may think reasonable or best, naturally flows an ideological complacency about where the individual then finds himself.<sup>276</sup> And as the citizen-individual is left in splendid isolation holding whatever portion he apparently has chosen, procedural due process is left with no apparent function to perform. Positive law supplies not only substance but also procedure.

Note that the entire account, thus far, has proceeded on the assumption that interactions between individual and government are not fundamentally different than interactions between two "private" individuals. "Bitter with the sweet" comes straight out of the familiar contractarian model of two rational actors, perfectly self-knowledgeable and possessing equal power, who confront one another and, after consulting the private calculus of self-interest, choose whether to accept the other's terms. This conflation of public and private is

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274. "Negotiation is *the* legitimate process for classical liberals . . . . Submission to another emerges through consent; consent thus transforms potential domination into cooperation." J. MASHAW, *supra* note 43, at 227 (emphasis in original).

275. See, e.g., *id.* at 192.

276. See, e.g., Smolla, *supra* note 50 at 114 (Judgments about constitutional process in administrative environments "must often be influenced by the feeling that recipients have in fact voluntarily given up certain rights in exchange for a public benefit, and it is not clear why that judgment is illegitimate.").

initially perplexing in an ideological universe that generally sets such stake on distinguishing between the two. The explanation for the apparent contradiction can be found by going back a moment to dignitary theory.

Dignitary theorists automatically and without discussion “pierced the veil” of government to regard the official engaged in public administration no differently than any individual acting in his private capacity. In this, they adhered to the liberal-legalist view of humans as separate, fully individuated beings with needs and desires not contingent, in either origin or satisfaction, upon others. Any group composed of such beings, even government, is simply an aggregation of separate selves, each retaining his essential nature unaltered by the incidental fact of affiliation. That one of two parties to a dispute over resources is a government official is significant only in that he possesses additional power in the struggle of contending wills. This understanding of the public official as simply another individual (who happens to have greater scope for self-regarding action) both set up and rendered irresolvable the “use as means” dilemma of dignitary theory. Since status as government agent is essentially irrelevant to individual identity and personhood, it cannot be the basis for any altered rights or responsibilities vis-a-vis other individuals (who happen to be seeking government resources).

Once dignitary theory quite logically (within liberal-legalist assumptions) pierced the veil of government to think about the government *official* as simply any other individual, it was but a short step to thinking about *government* as simply any other actor. Thus, commentators came to talk unself-consciously about the “rights” and “freedom” of government.<sup>277</sup> And from there it was an even shorter step to assuming that government (like any other actor) is presumptively free to be arbitrary; absent some demonstrable and legitimate basis for imposing an obligation to the other, it is free to pursue its own interests as aggressively as any other sovereign will.<sup>278</sup> When this presumption is conjoined with the commitment to holding the individual responsible for choices he has been free to make, the resulting dynamic makes “bitter with the sweet” virtually unstoppable within the liberal-legalist understanding.<sup>279</sup>

The commentary did, nonetheless, try to resist it. Monopoly theorists attempted to meet consent on its own terms, but faltered as they tried to specify what it means for a citizen to “have a choice” about dealing with his government. Caught within the contractarian model, they had to accept the ideological correctness of the premise that government (like any other actor in a competitive market) has the right to be “as arbitrary as economic feasibili-

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277. *E.g.*, Simon, *supra* note 59, at 164, 173; Terrell, *supra* note 59, at 904.

278. *E.g.*, Terrell, *supra* note 59, at 910 n.238. Despite the market rhetoric in which this idea is often expressed by contemporary scholars, it is not a new development. The presumptive equation of government with a private actor was at the heart of the right-privilege distinction. See, for example, the opinions of Holmes in: *Commonwealth v. Davis*, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895); and *McAuliffe v. New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892).

279. Thus, the commentary almost universally agrees that Chief Justice Rehnquist's position is logically “correct” within the existing doctrinal framework. See *supra* note 203.



ty permits"<sup>280</sup>—but all the implications of that starting point felt wrong. Caveat emptor may have a venerable pedigree in the liberal-legalist universe, but “caveat citizen”—wherein government is free to drive “tough-minded and self-serving contractual bargains with the citizenry”<sup>281</sup>—is harder to swallow. Successfully mediating these conflicting impulses required developing a theory of choice that could negotiate the knife-edge line between condoning exploitation and enshrining paternalism—a task that made contract law’s attempt to define unconscionability and overreaching in the private sector seem child’s play by comparison. As if the knot weren’t Gordian enough, dignitary theory briefly reemerged to query, softly, whether individuals *could* consent to relationships in which they were treated as mere means.<sup>282</sup> And monopoly theorists were forced to admit the added complication of inalienable rights. Round and round the theorists went, unable to catch the tail of consent, unable (in the liberal-legalist universe) to stop trying.

Perhaps intuiting that this imbroglio could yield no answers, the Court resorted to fiat. The doctrine would look to positive law for the interests protected and ignore it for the process due. As theoretically and practically satisfying as actually cutting the baby in half, this resolution at least allowed the jurisprudence to move forward—in a course at once predictable and doomed.

The standards requirement—process is available only when positive law contains mandatory substantive standards that enforceably constrain agency discretion—followed quite naturally from the premise of autonomous actors indifferent, if not openly antagonistic, to one another’s interests. There could be no point in compelling an interaction between two such beings if there were no basis upon which the one with power over the contested resource could be forced to yield. At least, there could be no *legitimate* point. Interchange in such circumstances could only produce objectivity-destroying personal pleas, corrupting appeals for special treatment, a dangerous regime of law without rules.<sup>283</sup> The standards requirement was thus a logical doctrinal entailment of core liberal-legalist assumptions. And, once again, those same assumptions generated vehement objections to the doctrine they had created. If individuals with power have no incentive to use it altruistically, then citizens require most protection where official power is most expansive. The standards requirement withholds due process precisely where the need is greatest.

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280. Terrell, *supra* note 59, at 906.

281. Smolla, *supra* note 50, at 112 (characterizing the position of Justices Holmes and Rehnquist). *See also id.* at 115 (“Once it is accepted that freedom of contract and open marketplace ideas may be sufficient to sustain the rationality of conditions on largess, one must be willing to swallow many one-sided bargains, including bargains that one may wish, as a matter of personal politics, the government had never struck.”).

282. *See, e.g.,* Michelman, *supra* note 138, at 166 n.66.

283. *See, e.g.,* Dixon v. Love, 431 U.S. 105, 114 (1977) (Plaintiff, whose driver’s license was summarily suspended, “is really asserting the right to appear in person only to argue that the Secretary should show leniency and depart from his own regulations.”). *Cf. J. MASHAW, supra* note 43, at 178 (“In short the demand is for law without rules.”).

This criticism (not surprisingly) rests upon the same view of process as that which impelled the standards requirement in the first place: Process is confrontation, wherein it is revealed who is entitled to prevail and who is compelled to yield. Therefore, even as they condemned the standards requirement, liberal-legalist assumptions insisted that some principle of reckoning—some criteria by which winner and loser are ordained—must be present. Moreover, because an individual (particularly one whose willfulness is enhanced by the possession of official power) could not be trusted to capitulate merely on the strength of reasoned argument, policing by some disinterested arbiter must be possible.<sup>284</sup> However, the ability of courts to serve that role is (in this world) carefully circumscribed. Combat by trial legitimately proceeds only where the rules for declaring the victor are neutral, objective, and determinate.<sup>285</sup> Courts cannot properly summon parties to the ritual of process without substantive standards that are mandatory (to provide the warrant for compulsion), specific (to set the boundaries for contest), and explicit (to reveal the canons for judgment). And so the standards requirement became a part of the doctrine that could not be tolerated, and could not be abandoned.

Finally and most obviously, liberal-legalist assumptions determined the shape (and, ultimately, the contradictions) of “what process is due?” The *Mathews* balance perfectly embodies the presumed radical disconnectedness and oppositionality of the contestants. It would be inconceivable to attribute to the individual any concern with the integrity of the program as a whole or with the effects on other actual and potential recipients—just as it would be inconceivable that the interest of the government could be other than avoiding the costs of giving in to citizens’ demands.<sup>286</sup> Forming the pivot of the balance (and hence effectively determining how the balance tips) is the risk of error—the point at which the court assesses the capacity of procedure to flush out truth, that correspondence of fact to principle in which rightholder and wrongdoer stand revealed.<sup>287</sup> When applied to the reality of resource distribution in the modern administrative state, however, this theoretically consistent construct utterly fails. The premise of adversarialness coupled with the focus on accuracy generates the process ideal of the full, judicial-type trial. Yet, as the Court quickly realized, this sort of procedure cannot possibly accompany

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284. See, e.g., Michelman, *supra* note 138, at 129-30.

285. See, e.g., *id.* at 130.

286. Thus, *Goldberg*’s early assertion of a societal interest in the material and psychic well-being of citizens, 397 U.S. at 264-65, quickly disappeared from the analysis, a judicial embarrassment that was (in this world) so clearly a makeweight.

287. This concern with accuracy is ordained, two-fold, by liberal legalism’s exaltation of the Rule of Law. First, accuracy essentially constitutes the Rule of Law. The comprehensibility and predictability that a legal order must provide rational actors entails not simply the existence of definite, coherent rules but also their correct and consistent application. See, e.g., J. MASHAW, *supra* note 43, at 219. Moreover, the concern with accuracy instrumentally furthers the Rule of Law. Official power cabined with processes that direct and verify its exercise towards prescribed ends is less threatening to citizens’ security. See, e.g., Rubin, *supra* note 5, at 1104.

the multitude of regulatory decisions.<sup>288</sup> And so the goal of accuracy was abandoned in favor of the goal of accurate-enough-given-all-the-circumstances—a pragmatic compromise ideologically vulnerable as illegitimate utilitarianism,<sup>289</sup> abdication of constitutional responsibility,<sup>290</sup> and judicial usurpation of political judgments.<sup>291</sup>

And ultimately, there is the sobering knowledge that, at a time when government has embarked upon resolving more, and more complicated, social and economic problems than ever before in our history, judicial declaration of process rights marks the end of innovation and adaptability. At the agency level, we have watched programs rigidify around the contours of entitlement, as constitutional floors become process ceilings.<sup>292</sup> When law is understood as demarcating the extent to which one is compelled to yield to the hostile demands of the other, it is not surprising that a decision which specifies the minimum a losing official must give, comes to establish the maximum he will offer. As for the Court, we have watched it retreat under the pressure to declare, once and for all time, the perfect due process solution that will save citizen-individuals confronting some new facet of regulatory power. When constitutional law is understood as the rational elucidation of neutral and determinate principles, a court facing the ever-expanding, ever-changing administrative state cannot experiment—it can only make mistakes.

#### IV. DIFFERENT ORIGINS AND INTIMATIONS OF A DIFFERENT DOCTRINE

*"This is a circle that must be broken,  
not inhabited."*<sup>293</sup>

I have come a long way to offer a short proposition: We cannot use an ideology of autonomy, privacy and self-sufficiency to create a jurisprudence about the citizen's relationship to her community, access to public resources, and dependence upon governmental and private others. If we want a humane and satisfying account of procedural due process in modern society, we must

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288. And, on the rare occasions when the "ideal" procedure was ordered (as in the case of welfare in *Goldberg*), the result was process at once too much, not enough, and fundamentally of the wrong sort. See *supra* notes 228-29 and accompanying text.

289. It sacrifices the individual to some collective social balance. See, e.g., J. MASHAW, *supra* note 43, at 152.

290. It insufficiently counteracts the potential for abuse of official power. See, e.g., Mashaw, *supra* note 224, at 58.

291. Once the goal is not the neutral, objective goal of accuracy but rather the compromised goal of "enough" accuracy, that level should be set through the political processes. See, e.g., J. MASHAW, *supra* note 43, at 152; Mashaw, *supra* note 224, at 49.

292. For example, *Goldberg's* refusal to hold that due process required provision of counsel in welfare termination hearings was followed by the agency's withdrawing proposed regulations that would have made counsel available. See J. MASHAW, *supra* note 43, at 260-61.

293. Robin West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 86 (1987).

begin with something other than the set of liberal-legalist assumptions. The new beginning I suggest here is a set of feminist understandings and methods.<sup>294</sup>

Let me emphasize that it is indeed a *beginning* I speak of. I can tell you what I think are the new starting points, a series of understandings about human nature, knowledge, society, government and law. And I will suggest that they are better starting points, for they correspond in important ways to our experience of life in the contemporary regulatory state. At the same time, however, I must acknowledge these understandings as emerging rather than established, provisional rather than propositional. Feminist theory is quintessentially work-in-progress, historically still in its formative stages and also, more important, ideologically committed to remaining fluid, possibilistic and open to reassessing goals and strategies as perspective and experience grows.

Similarly, I can tell you what I think are the methods through which a new doctrine would develop. And I will suggest that they are better methods, for they are ways of thinking more suited to the complex task of specifying process in the regulatory state. At the same time, however, I will not attempt to predict the precise doctrinal structure that would result. Feminist ways of thinking warn against solutions that emerge, like Athena, full-blown from the

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294. Sensitive to the perils of seeking the "essentially" or "universally" feminist, *see* Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL FORUM 115, 129-34, I speak carefully of "a set of feminist understandings." These might be characterized as an attempt to infuse into a relational (or cultural) feminist base some of the insights about power that mark dominance (or radical) feminism. A merger such as this is bound to evoke disagreement, or at least proposed qualifications. I do not mean to devalue such reactions, but, in this context, I am wary of stressing the differences within feminist theory. Any attempt to reconceptualize an area so thoroughly steeped as procedural due process has been in liberal-legalist thinking must present, *at least in the project's earliest stages*, an alternative vision that is fairly coherent and relatively unconflicted. I hope that many of the ideas and methods set forth in this section will be acknowledged by many feminists—at least as a *first* statement of what this alternative vision would be. If the discussion implies a greater degree of uniformity within feminist thought than many would, as a general matter, find acceptable, I offer the incipency of this project as both justification and excuse.

A very different sort of criticism might object that many of the understandings and methods I discuss are not unique to feminist theory. To be sure, feminism shares with critical legal theory an insistence on deconstructing the rule of law, *see, e.g.*, ROBERTO UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); with neo-republicanism, a belief in a public good that is more than the sum of expressed preferences, *see, e.g.*, Cass Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988); Frank Michelman, *The Supreme Court, 1985 Term—Forward: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986); with communitarianism, a recognition of the constitutive nature of relationships with others and the possibility of altruism, *see, e.g.*, MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); with critical race theory, a contextual assessment rather than categorical rejection of rights, *see, e.g.*, Patricia Williams, *Alchemical Notes: Restructuring Ideals From Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987); with narrativists, a consciousness of the power of naming and the symbiotic relationship between law and how we perceive our world, *see, e.g.*, Gregory Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988); and with pragmatism/practical reason, a recognition of the importance of contextual thinking, *see, e.g.*, Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699 (1990). Doubtless there are other commonalities, just as, in each instance, there are significant divergences. *See, e.g.*, Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL FORUM 59 (differences between feminism and CLS). However, to debate the provenance of particular ideas would be, at this juncture, a truly prodigal use of our energy. *See* Minow, *supra*, at 131. To the extent that feminist understandings coincide with other alternatives to liberal legalism, all the better. We should sooner be able to break the hold it has had on our thinking. I do not, and do not need to, make the claim that feminist theory is utterly original to propose that feminist understandings and methods represent, in the aggregate, a singularly promising approach in this area.

detached contemplation of the solitary rational mind.<sup>295</sup> I recognize that this tentativeness may feel frustrating. Trained as good liberal-legalists, you and I both would be most comfortable contemplating a set of alternative premises, carefully abstracted and logically arranged, from which a comprehensive set of "new" doctrinal conclusions are syllogistically derived. But the first step in this venture of beginning again is to resist all the old habits of mind that will ask for "feminist due process" to be delivered in a small black box neatly tied with pink ribbon.<sup>296</sup> Feminist thought is a singularly promising source for a better due process jurisprudence precisely because of such elements as its commitment to theory emergent from and always transmutable by living context and its resistance to grand, olympian, acontextual solutions. If we are brave enough to grasp such resources, we can create a jurisprudence that allows us to imagine and realize a satisfying understanding of the relationship between we, the people, and our government.<sup>297</sup>

And so I ask you to read this final section not as a denouement, in which all questions are answered and truth is finally revealed, but as an introduction. Consider it not a consummation but a prospectus, an invitation to join in the undertaking of conceiving procedural due process anew.

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295. Athena's unnatural birth is chronicled by Hesiod:

"Zeus himself produced. from his own head,  
Grey-eyed Athena, fearsome queen who brings  
The noise of war and, tireless, leads the host,  
She who loves shouts and battling and fights."

*Theogony* 53 (Dorothea Wender trans. Penguin Classics ed. 1973).

296. My colleague Steve Shiffrin gave me this image.

297. Having several times spoken of "better" approaches, perhaps I should make explicit the sense in which I use that word. Kate Bartlett best captures it:

Realities are deemed better not by comparison to some external, "discovered" moral truths or "essential" human characteristics, but by internal truths that make the most sense of experienced, social existence. Thus, social truths will emerge from social relationships and what, after critical examination, they tell social beings about what they want themselves, and their social world, to be.

Katharine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 884 (1990) (citations omitted).

A. *New Places to Begin*<sup>298</sup>

“[W]hat would this legal landscape look like  
if women had constructed it for ourselves?”<sup>299</sup>

Begin with an insight into human nature. Personhood is a delicate and protean balance of intimacy and differentiation. What the self knows, feels and desires is shaped by interaction with others; without them, she could not be who she is. At the same time, she is an active agent in the creation of knowledge, feeling and desire; without her, others could not be who they are. Neither she, nor they, can thrive if she loses either her sense of separateness or her sense of connection. Her daily life confirms all this. The raising of children—in which she simultaneously teaches and learns, provides security and encourages independence, gives care and experiences being cared

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298. This section draws in many ways on the work of many women, including A. JAGGER, *supra* note 254; MARY BELENKY, BLYTHE CLINCHY, NANCY GOLDBERGER & JILL TARULE, *WOMEN'S WAYS OF KNOWING* (1986); CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982); CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); *Buffalo Symposium*, *supra* note 241; Bartlett, *supra* note 297; Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Drucilla Cornell, *Dialogic Reciprocity and the Critique of Employment at Will*, 10 CARDOZO L. REV. 1575 (1989); Lucinda Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989); Sandra Harding, *Is Gender a Variable in Conceptions of Rationality? A Survey of Issues*, in *BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN IN PHILOSOPHY* 43 (Carol Gould ed. 1984); Lynne Henderson, *Legality and Empathy*, 85 MICH. L. REV. 1574 (1987); Christine Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL FORUM 23; Littleton, *supra* note 254; Mari Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 NEW MEX. L. REV. 613 (1986); Minow, *supra* note 294; Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987); Nedelsky, *supra* note 254; Rhode, *supra* note 254; Scales, *supra* note 254; Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Suzanna Sherry, *The Gender of Judges*, 4 LAW & INEQUALITY 159 (1986); West, *supra* note 254; Caroline Whitbeck, *A Different Reality: Feminist Ontology in BEYOND DOMINATION*, *supra*.

299. Littleton, *supra* note 298, at 30 (citations omitted).

In using the feminine gender in the sections that follow I am obviously making what is, at some level, a gendered claim about how we do and should think about our world.

I do mean to suggest that these understandings of human nature, society, knowledge and law grow out of what is characteristically the experience of women in our society. Even if this experience were accessible *only* to women, liberal legalism's failure to account for it would be particularly problematic in the area of procedural due process because of two basic demographic facts: As the gap between rich and poor in our country grows greater and as our population becomes relatively older, women with children and women past retirement age increasingly constitute the citizens who must encounter regulatory power, at least in its social welfare dimension. *See, e.g.,* MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICY FROM COLONIAL TIMES TO THE PRESENT* 1 (1988); Mary Becker, *Politics, Differences and Economic Rights*, 1989 U. CHI. LEGAL FORUM 169; Nancy Fraser, *Women, Welfare, and The Politics of Need Interpretation*, 2 HYPATIA 103 (1987); Barbara Nelson, *Women's Poverty and Women's Citizenship: Some Political Consequences of Economic Marginality*, 10 SIGNS 209, 221-23 (1984). But ultimately I do not believe, and so do not mean to suggest, that the experience which nourishes feminist theory is inevitably inaccessible to men. Perhaps this is wishful thinking, for I doubt that women by ourselves could recreate the regulatory state. However, I find cause for optimism not only in the flourishing of such alternative political and jurisprudential philosophies as CLS, communitarianism and neo-republicanism, but also in responses of men I live and work and dream with, that many men find feminist understandings expressive of what they want themselves and their world to be.

for<sup>300</sup>—is perhaps the clearest manifestation, but it is only one of many. Students, neighbors, co-workers, parents and older relatives, lovers, friends, all reach out to her, asking from her and giving to her, confirming the subtle and varied ways in which she and they are materially, emotionally and intellectually interconnected.<sup>301</sup>

Immersed in the reality of human interconnection, she has two profoundly different experiences of human response to dependence. One experience is the response of nurturance, the ethic of care, the acceptance of power as responsibility. She sees herself responding to need with compassion, finding fulfillment in helping others become fulfilled, making decisions by asking how others, as well as self, will be affected.<sup>302</sup> The other experience is the response of exploitation, the ethic of selfishness, the use of power to dominate. She often experiences these as a victim. Embedded in her home, her job and her society is the threatened or realized violence of physical abuse, economic deprivation, psychological battering, spiritual violation. Sometimes, she experiences these as perpetrator. Uncared for herself, she may lose the capacity to care; without the material and psychological resources to help those who need her, she may close herself off to their suffering; a self battered and diminished by the indifference and predation of others, she may be able only to batter and diminish other selves.<sup>303</sup>

Thus, for the feminist self, separation and connection, power and dependence are not simple phenomena. Inescapably part of the fabric of human existence and capable of representing great good and great evil, these qualities could not be sought or condemned in the abstract. Children can be, and are, destroyed both by abandonment and by smothering. Adults can be, and are, devastated both by being cast off as different and by being denied recognition

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300. "We expect parents to nurture children, but forget that children nurture parents. Even the fact that children often nurse sick and temporarily bedridden parents [or siblings] is by a pathological twist of the social memory simply forgotten." Whitbeck, *supra* note 298, at 78 (quoting Elise Bouldring; brackets in original).

301. Hence, as both a descriptive and normative matter, feminists work towards a reconception of "autonomy" in which differentiation of the self occurs, but not through opposition to the other. *See, e.g.*, Nedelsky, *supra* note 254; Whitbeck, *supra* note 298, at 69.

302. Carol Gilligan's work is the most influential documentation of the ethic of care. *See* C. GILLIGAN, *supra* note 298. *See also* MAKING CONNECTIONS: THE RELATIONAL WORLDS OF ADOLESCENT GIRLS AT EMMA WILLARD SCHOOL (Carol Gilligan, Nona Lyons & Trudy Hanmer eds. 1990); MAPPING THE MORAL DOMAIN (Carol Gilligan, Janie Ward & Jill Taylor eds. 1988). The controversy over this work within the feminist community has sometimes ignored Gilligan's own emphasis that, in its *mature* state, the ethic of care seeks to integrate care of others *and* care of self. *E.g.*, C. GILLIGAN, *supra* note 298, at 73-105; *Buffalo Symposium*, *supra* note 241, at 58-61. *Cf.* Whitbeck, *supra* note 298, at 65 ("Nurturing" is a loaded term, often used "to evoke a sentimental picture of a woman doing a variety of mindless tasks in response to the demands of others . . . . The creativity and responsibility of all parties in the conduct of the practice [of nurturing] in its full, liberated form is inconsistent with the sentimental picture of women's self-sacrifice.").

303. *See* LENORE WALKER, THE BATTERED WOMAN SYNDROME 59-60 (1984) (Interviews with battered women suggest that they are eight times more likely to abuse their children when living with batterer than when not.). *See also* Henderson, *supra* note 298, at 1583-84 (If highly empathetic person lacks means for helping, she "may avoid dealing with suffering altogether" or engage in nonaltruistic behavior such as blaming victim.).

as singular. The self with power over another can, and does, use it both to oppress and to save. The self reaching out to another for support can be, and is, met both with derision and with generosity. In the complex fabric of human relationships, the value of more separation or more connection, as well as the morality of power or dependence, can often be judged only within context.

Still, some basic dynamics can be recognized. When the sense of connection with the other is lost, dependence may come to evoke indifference and even ruthlessness, while power may readily degenerate into psychological and even physical violence. Similarly, when a person lacks the tangible and intangible resources and opportunities that her society generally regards as necessary for full participation in the life of the community, she becomes vulnerable, as a victim and a perpetrator, to abuse of power and exploitation of dependence.

The first of these dynamics, the relationship between the use of power and the sense of connection with others, implicates the matter of knowledge. For the feminist self, knowledge of others is not a simple phenomenon. The project of knowing is at once optimistic and deeply wary. It is optimistic in affirming that persons can achieve meaningful understanding of one another. Reflecting the experience that individuality is spun within a web of relationships, it does not conclude that selves are condemned to atomistic enigmaticness. It is wary because feminism has discovered the dangerous tendency, particularly in those who possess power, to impose one's own experience as the norm and to dismiss different experiences as irrelevant or deviant, or silence their expression all together.<sup>304</sup> Hence, the feminist search for knowledge is especially attuned to seeking out the voices of those who lack power.

The project of knowing is at once rational and resolutely nonrational. Because rationality is but one dimension of human awareness, rational discourse can be but one way of knowing. Empathic and intuitive ways of understanding must also be pursued, for feminism has discovered that privileging rationality—at least so long as rationality is equated with objectivity—facilitates domination by obscuring the connection with others who appear most different from the self in background, experience and power.<sup>305</sup>

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304. The vivid first stage of this discovery was the realization that patriarchal society has long silenced women in this way. Increasingly, though, feminists are recognizing the subtler manifestations of this tendency even within the population of women, as when white, educated, affluent, straight women with their position of relative privilege are oblivious to the experiences of women of color, poor women, and lesbians. From the painful recognition that even feminism is not immune to this tendency, feminist theory has become even more determinedly committed to ways of knowing that counteract it. *See, e.g.*, Bartlett, *supra* note 297, at 847-49; Minow, *supra* note 298, at 59-60.

305. The liberal-legalist equation of rationality with objectivity is a dangerous linkage. Because "[t]here is no Archimedean point outside the world where we may stand to gain a perspective on reality that is neutral between the interests and values of existing social groups," the assertion of objectivity merely provides a deceptive "cover of neutrality." A. JAGGAR, *supra* note 254, at 362, 378. Moreover, it encourages detachment from the persons and situations that could reveal the partiality of the knowledge claimed as "objectively" true. *See* Scales, *supra* note 254, at 1389. *See also* Henderson, *supra* note 298, at 1586 (studies show persons have reduced empathic response "if they are instructed to view a victim in a detached way").



Finally, the project of knowing is determinedly contextual and concededly nonfinal. As before, this account of the epistemological enterprise is both descriptive, reflecting experienced qualities of human life, and normative, forswearing methods that lead to pain and oppression. Persons do not exist outside the interlacing of relations and experiences which shape identity and awareness, needs and desires; persons are not immutable bundles of static interests and uncontingent preferences. To ignore the importance of perspective and its multiplicity, or to fail to recognize that changes in circumstance can change the persons within them, is a prescription for disaster. The notion of truth as a unitary absolute that can be single-handedly wrestled to the ground and ever-after possessed has produced both arrogant colonizations and failed crusades, as those with power to effect change have mistaken the partial and provisional for the universal and timeless.<sup>306</sup>

The second dynamic, the relationship between the use of power and the equitable distribution of resources and opportunities, implicates the matter of society, government and law. Because individual identity forms within personal relationships and social networks, society must be understood as both constituted from, and constitutive of, the persons within it. Its dominant forms of activity will both reflect and create their values, needs and desires. Just as a person continually shapes and is shaped by her local environment, so a people continually makes and is made by its government and its law. Given this, it would be meaningless to charge the state to avoid privileging certain concep-

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Feminists seek to sever the link between rationality and objectivity by articulating a different and richer understanding of rational processes. "A rational person, for women, values highly her abilities to empathize and 'connect' with particular others and wants to learn more complex and satisfying ways to take the role of the particular other in relationship. A rational person naturally has problems when there is too little connection with particular others." Harding, *supra* note 298, at 52-53. See also Bartlett, *supra* note 297, at 857-58 (feminist rationality is "process of finding commonalities, differences and connections" that openly reveals its underlying moral and political choices and strives to integrate emotion and intellect).

The insistence that affective responses are an important source of knowledge is not a call for uncritical abandonment to passion. "Like so-called cognitive knowledge . . . feelings and emotions are social constructs, and this means that they are not self-authenticating. Like our perceptions, our feelings and emotions may be distorted . . . by the prevailing ideology and even by the oppressive structure of daily life . . . . All aspects of our experience, including our feelings and emotions, must be subjected to critical scrutiny . . . ." A. JAGGAR, *supra* note 254, at 380 (citations omitted).

306. The commitment to the provisional nature of knowledge is not an abandonment to relativism. See Littleton, *supra* note 298, at 26-27. Kate Bartlett explains this through a concept she calls "positionality":

Positionality is not a strategy of process and compromise that seeks to reconcile all competing interests. Rather, it imposes a twin obligation to make commitments based on the current truths and values that have emerged from methods of feminism, and to be open to previously unseen perspectives that might come to alter these commitments. As a practical matter, of course, I cannot do both simultaneously, evenly, and perpetually. Positionality, however, sets an ideal of self-critical commitment whereby I act, but consider the truths upon which I act subject to further refinement, amendment, and correction.

Some "truths" will emerge from the ongoing process of critical reexamination in a form that seems increasingly fixed or final . . . . These truths, indeed, seem to confirm the view that truth does exist (it must; these things are true) if only I could find it . . . . The problem is the human inclination to make this list of "truths" too long, to be too uncritical of its contents, and to defend it too harshly and dogmatically.

Bartlett, *supra* note 297, at 883-84 (citations omitted).

tions of the good over others. All exercises of government power are value-laden. The greater the reliance upon government and law as forms of activity through which a society defines the physical, economic and social conditions in which citizens live, the greater is the need to acknowledge this fact. In any but the most minimalist state, the pursuit of neutrality is not only illusory but dangerous, disguising the fact that certain conceptions of the good and certain distributions of power are being favored.<sup>307</sup>

To understand that every exercise of public power reshapes, for good or ill, the public and private world<sup>308</sup> does not identify the set of values government and law should pursue. But it is an essential first step towards creating a society in which all citizens can flourish. By uncovering the inescapable "moral crux"<sup>309</sup> of public power, we force ourselves to shoulder the responsibility for deciding which values ought to be advanced and whose interests ought to be favored.<sup>310</sup> In this essential process of value discovery and affirmation, we can be guided by our understandings of the phenomena and dynamics of separation, connection, power, dependence and knowledge. Hence, we can know that we must work towards an equitable distribution of resources and opportunities in order to ameliorate the material conditions and power imbalances in which persons become victims and perpetrators of oppression. As important, we know that we must cultivate practices which reveal the connection with others, in order that the disparities in power that remain will be exercised under the ethic of care and responsibility. We recognize that the process of accomplishing these things will necessarily be an incremental and iterative one, in which answers are developed in context and theories are modified with experience to yield results that approximate ever more closely what we hope to become as a people. There can be no universal blueprint for the good society, no step-by-step instructions for manufacturing the conditions in which each citizen can flourish. In particular, there are no easy shortcuts through consent.

For the feminist self, consent is not a simple phenomenon. On the one hand, the power of choosing is a significant experience of personhood.

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307. Moreover, the maintenance of a minimalist state would itself be a heavily value-laden distribution of power. *See generally* CASS SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 39-45 (1990).

308. My use of the "public" and "private" here, and throughout, is intended to affirm a connection rather than a disjunction between the two spheres. The public/private "distinction" is another of the concepts feminist theory is deconstructing and reconstructing from liberal legalism. *See, e.g.* Rhode, *supra* note 254, at 631.

309. Scales, *supra* note 254, at 1387.

310. These questions certainly are not simple . . . [t]hey confront every political theory . . . and it is far from clear that any theory has an entirely satisfactory answer to them. What is clear, however, is that an adequate answer can never be found so long as one retains the assumptions of abstract individualism and the view of rationality as morally and politically neutral.

A. JAGGAR, *supra* note 254, at 48. "[W]hoever pretends moral choice is easy is ignoring the fact that sometimes—many times—moral choice is a choice among evils . . . . To the extent I understand what it is I face, I understand my moral options. I simply cannot pretend absolute certainty." Henderson, *supra* note 298, at 1584, 1585 (citations omitted).

Growth, moral responsibility, and self-awareness all involve the exercise of choice; denial of the ability to choose is felt as a painful denigration of the self. On the other hand, because personhood develops within physical, social and historical context, what the person desires cannot be dissociated from the demands, expectations and opportunities she has experienced. Hence the very setting in which the person is asked or required to choose shapes, to some extent, the choice she makes.<sup>311</sup> A failure to acknowledge the complexity of consent will end either in ideological paralysis (how could we decide that people should have, or do, something other than what they say they want?) or self-righteous callousness (why should we, who have better managed our lives, intervene to save consenting adults from themselves?).

In the feminist effort to conceive the good society, it becomes easier to acknowledge the disturbing complexity of choice because of the understanding that consent is not the sole benchmark of personal and public responsibility. That a person had once consented would not necessarily justify forcing her to bear a burden or forego a benefit. This is so even apart from the need to scrutinize carefully the conditions within which her choice arose. Because government and law are activities in which public values and identity are created as well as enforced, there will be interactions that public officials cannot orchestrate or facilitate, consistent with what we are and want to be, regardless of a particular citizen's willingness to endure them.<sup>312</sup> By the same token, the absence of some act of consent would not necessarily preclude the presence of obligation. As the person experiences daily in her interactions with parents, siblings, children, neighbors or coworkers who are not necessarily people whom she would have chosen as friends, responsibility to exercise care and offer support sometimes arises from the fact of relationship itself.<sup>313</sup> Hence, in understanding the obligations, of persons to one another and of government to persons, that inhere in the social and political relationship that is citizenship, consent may not be irrelevant—but it is surely not dispositive.

Given all this, it is not surprising that law in its adjudicatory dimension is

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311. This poses a two-fold problem in using consent to identify the values that foster human flourishing. Most directly, preferences are not prepolitical and uncontingent. See, e.g., A. JAGGAR, *supra* note 254, at 43-44. More subtly, we cannot assume that, even allowing for the adaptive quality of preferences, the choices people make accurately express what they want for themselves. Women may consent in order to increase the satisfaction of *others rather than self*. See West, *supra* note 293, at 92. While feminist theory rejoices in women's experience of nurturing and care for others—an experience that belies the liberal-legalist assumption of humans as paragons of selfishness—it also sees clearly the dark side of always putting the needs of others first. E.g., *id.* at 92-93, 96-97; *Buffalo Symposium*, *supra* note 241, at 27, 73-75 (remarks of Catharine MacKinnon). Hence Carol Gilligan's insistence that mature moral development is reached only when the ethic of care is extended to encompass self as well as others. See *supra* note 302.

312. Or, regardless of a majority of citizens' willingness to sanction them. "What seems important is the clear articulation of the values a society considers basic (surely an ongoing process), together with the idea that democratic outcomes are not (at least in the first instance) dispositive of the meaning of those values or what counts as a violation of them." Nedelsky, *supra* note 254; at 35.

313. This same responsibility to exercise care and offer support may arise from the fact of a relationship with a lover—a lover whom the person at first chose but who now batters her, or a lover whom others chose (because in her culture the choice is others') or whom circumstance forced on her (perhaps because of an unwanted pregnancy).

not, for the feminist self, a simple phenomenon. In a culture in which citizens regularly bring into courts our most compelling social issues, adjudication represents a critical moment in which we examine the society we are and elaborate the one we aspire to become. Rights discourse offers a promising mechanism by which responsibility can be articulated and the distribution and use of power can be assessed. If, however, the language of rights can be used only to claim separation and to wrest away power, adjudication not only fails to realize its potential as a norm-discovering enterprise. It becomes an actual impediment, even a threat, to the creation of the good society. If one of the most powerful oracles of our values can speak only about the desirability of separateness and the danger of dependence, we will learn nothing about the indispensability of connection and the generous, responsible use of power. If one of our most significant social rituals can model human interaction only as battles or deals and can understand its function only as refereeing conflict or enforcing bargains, we will learn that exploitation, naked or disguised, is how we do and should behave.

And if, having taught us that connection has no value and that predation is the norm, law then holds itself out as our protection from abuse of power, it promises most falsely. The feminist self, seeing the intricate and fragile web of interdependence between self and other, sees also the enormous devastation that the other can wreak if he repudiates those bonds. The perils of the battlefield and the market—that greedy others will take one's life or one's possessions—pale to the self who contemplates the battering and impoverishment of women and children, the abuse of the elderly, the abandonment of the homeless, the humiliation of the disabled, the gross and petty violence against those who are not white or male or straight or christian, the bodily occupation that is rape, the spiritual rapine that is prejudice. By pretending that dependence upon others is an aberration which the prudent man can avoid, by pretending that rights-as-sword-and-shield can save the self in an onslaught of all against all, law perpetrates a delusion as deadly as the myth that nuclear war can be survived.

Feminist understandings recognize that law in its adjudicatory dimension cannot be a positive force in the quest for human flourishing so long as it distorts and denies important aspects of human existence. To be sure, rights as swords and shields are needed at some times and in some contexts. Sometimes, conditions of domination have so persistently and pervasively denied people the aspiration and capacity of self-determination that they will require, first and foremost, greater psychological and material independence.<sup>314</sup> Some-

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314. This has been the response of both many feminists and critical race scholars to the CLS critique of rights. See, e.g., Mari Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 393-94 (1984); Schneider, *supra* note 298, at 593-98; West, *supra* note 254, at 46; Williams, *supra* note 296. The shortcomings of rights in such contexts are known well. "Rights are whatever people in power say they are." Matsuda, *supra*, at 338. Still, rights-as-swords-and-shields

times, there will be no way (at least that we can presently imagine) to imbue power with the ethic of responsibility and concern, so that it can be rendered safe only by taking it away or by providing those subject to it with some defensive capability.<sup>315</sup> But, at other times rights must function as bridges and channels, through which connection is established and affirmed and those with power are led to recognize responsibility and encouraged to act with compassion. Many times, a cycle of suffering can be broken only by seeking out affinity and nurturing cooperation to replace alienation and contention. Many times, power can be rendered safe only by acknowledging its reality and cultivating, in the very fact of its inevitability, a fiduciary ethic and a practice of care.<sup>316</sup>

In other words, the role of rights cannot be understood in the abstract any more than can the human needs and desires that rights attempt to secure. In law, as in the rest of life, the value of more separation or more connection, as well as the legitimacy of power or dependence, can often be judged only in context. If we are to make those judgments wisely, adjudication must not be disconnected from all the other processes by which we seek to understand and improve our lives. If we set courts the task of finding universal and timeless solutions, the result is not the vaunted generality and stability of the Rule of Law. We merely close our eyes to the partial and contingent nature of the answers adjudication generates, and so sacrifice the opportunity to adapt and improve upon them. If we restrict what courts can count as knowledge to that which appears rational and objective, the result is not the fabled impartiality and rigorous logic of legal truth. We merely condemn adjudication to a warped view of social problems and a crabbed vision of potential remedies. If we insist that judging be a value-free exercise in applying neutral principles, the result is not the triumph of apolitical, rationally uncontroversial reasoning. We merely guarantee that values are shaped by persons who hide from what

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are potent emblems in our culture, and play an important role in the early stages of escaping domination. They are capable of unsettling the dynamic of oppression, even though they rarely deliver all they promise. Perhaps more important, they can become a rallying point round which oppressed people create a new identity and experience the possibility (and hence the first real germ) of empowerment. See Matsuda, *supra*; Schneider, *supra* note 298; White, *supra* note 229; Williams, *supra* note 294.

315. Sheri Johnson has recently argued that this is precisely the case with criminal defendants, so that even a communitarian understanding of the Fifth Amendment would retain a rights-as-shield model of the privilege against self-incrimination. See Sheri Johnson, *Confessions, Criminals, and Community*, 26 HARV. C.R.-C.L. L. REV. — (forthcoming 1991).

316. Thus with rights, as with rationality, autonomy, liberty and other powerful concepts in our culture, feminist understandings both warn against the dangers of liberal-legalist conceptualizations and embark upon a project of constructive recreation. Urging that we reconceive rights as "a language that can express and remake patterns of all relationships," Martha Minow explains, "The formality of processes set in motion by rights claims may . . . alter or even impede certain kinds of communication. The claim of rights, however, need not predetermine the forms of requisite processes; people can use rights discourse to develop new procedures and remedies, as well as new claims." Minow, *supra* note 298, at 1891, 1871-72, n.40 (citations omitted). "The central problem with rights-based frameworks is not that they are inherently limiting but that they have operated within a limited institutional and imaginative universe." Rhode, *supra* note 254, at 635. Cf. Simon, *Invention and Reinvention*, *supra* note 229 (describing alternative vision of rights, and responsibilities of government power, that informed Progressive Social Work jurisprudence).

they are doing and who attempt to detach themselves from the moral, social and historical context in which they might find insight and compassion. And, if we acquiesce in the dynamic of wasteful, destructive adversarialness on grounds that adjudication just takes the litigants as it finds them, the result is not to impress on courts the modest role they play in social ordering. We merely encourage judges and lawyers to wash their hands of responsibility that litigants are no better.

Adjudication, like every other exercise of public power, reshapes the public and private world. It will do so for good only if its formative capacity is acknowledged, and if it is committed to ways of proceeding—at once more ambitious and more humble than the old ways—in which problems are seen “not as dichotomized conflicts, but as dilemmas with multiple perspectives,”<sup>317</sup> in which judgment becomes not the revelation of the virtuous winner and the unworthy loser but the occasion for “imaginative integrations and reconciliations,”<sup>318</sup> and in which wisdom is sought not only with the mind, but also with the heart.

#### B. *New Ways to Proceed*

*“[W]e are what we have made ourselves,  
and we must continue to make ourselves  
as long as we exist at all.”*<sup>319</sup>

If we began from these substantive and methodological understandings, what sort of due process jurisprudence might we create?

First, we would read the text very differently. We would see in “*due process*” the promise of process appropriate, satisfying and suitable. The phrase would become an assurance of the treatment that is fitting whenever government finds it must do harm to one of its citizens, treatment in which there is acknowledgement of loss inflicted, and respect for pain incurred. That such process attaches to “life, liberty and property” bespeaks a concern with the whole of human existence, the material and psychological well-being of each that depends upon a collective commitment of respect and support. We would therefore recognize in the clauses an affirmation of the connection between the people and their government, and a pledge that government will use its tremendous power with care. The phrases would become for us an exhortation to concerned contextualization, rather than a mandate of distancing abstraction. We would understand process as “right,” but understand “right” as a claim of relationship rather than a defense of separation.

The reasons why we, the people, would want such provisions in our

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317. Bartlett, *supra* note 297, at 851.

318. *Id.*, quoting AMELIE RORTY, MIND IN ACTION 274 (1988).

319. D. DINNERSTEIN, *supra* note 231, at 22.

formative document would not be hard to fathom. As persons and as citizens, we are creatures spun within a social web. Government is one of the principal institutions through which that web is shaped. Whenever the state acts as educator, employer, healer, discipliner or dispenser of needed goods and services, our individual and collective identities hang in the balance. If a citizen's interaction with the state becomes an experience of frustration, self-loathing or despair, we are individually and collectively diminished. We would want our government to have always before it a reminder of this grave and special responsibility. And, at the most basic level, we would recognize that our lives depend upon the strength and vitality of this sense of connection. If the vast reservoir of public power is to be rendered safe, those who govern must never be permitted to regard citizens as alien, the other, the enemy. Hence, our aspirations and our very survival coalesce in this overarching injunction to our government (ourselves) to take care in dealing with its people (one another), an injunction that integrates and transcends all the specific exhortations to care in surrounding, more particular constitutional clauses.

Understanding the clauses in this way, we would not see the striking increase in due process litigation during this century as an unfortunate and dangerous exploitation of an accommodatingly vague phrase. Rather, we would recognize this litigation as an ongoing enterprise in self-discovery and definition, in which we seek to comprehend, humanize and render benevolent the increasingly complex, powerful and interdependent society in which we live. We would see in due process the quintessential instance of rights as "a form of communal dialogue"<sup>320</sup> and realize that, of all adjudication, due process adjudication in particular could never be value-free, detached, abstract, universal, or final. We would understand that, especially at this point in our history, we *need* due process adjudication to be a consciously value-creating occasion that emphasizes the relationship between government and its people and elaborates the qualities and responsibilities of that relationship. Moreover, we would, for several reasons, perceive this enterprise as far more challenging, and far more hopeful, than we have regarded it till now.

Consider, for example, the issue of dependence. We have, until now, accepted liberal legalism's word that dependence is a dreadful thing—that it is inconsistent with full personhood (the unfettered exercise of self-determination is the essence of psychic satisfaction and moral responsibility) and fraught with peril (the other on whom one is dependent can only be expected to exploit the imbalance of power). Escaping dependence has thus been an irresistible force within procedural due process jurisprudence. And it has met the immovable object of the contemporary regulatory state. If there were ever a time when the individual could avoid dependence upon the collective, that time is gone. If it were ever possible for the citizen to aspire to a balance of power with government, it is possible no longer. The state will inevitably control

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320. Minow, *supra* note 298, at 1875.

access to things that we desire and require, from drivers' licenses to assistance in time of catastrophe. The state's agents will inevitably have discretion that could be used against us, no matter how rule-bound the regulatory regime.<sup>321</sup> Within the liberal-legalist worldview, we could only shut our eyes tight against this reality, put our heads down, and go on fighting for rights as barriers and process as weapons. Those on the political left waged the fight for everyone; those on the right concentrated only on those who appeared most likely to be saveable (i.e., those with traditional property and liberty). But the reality of the administrative state was relentless and respected no political camp. Increasingly we were forced to recognize the former strategy to be futile and even counterproductive,<sup>322</sup> while the latter strategy appeared as selfishly deluded as survivalism.

Now, however, we would recognize that it is the goal of escaping dependence that is futile, counterproductive and deluded, fundamentally at odds not only with what is possible for us as citizens in contemporary society but also with what is needful for us as persons.<sup>323</sup> Once we are freed of the burden of maintaining an impossible self-deception, we can raise our eyes to face the real question: How do we make relationships in which one person must place herself in another person's hands, relationships which do not imperil the humanity of *either* participant? Following one of the central methodological credos of feminism—learn from a thoughtful, critical examination of lived experience—we would begin to thread our way between the twin perils of despair and romanticism. We would remember that there are good parents (biological and adoptive, permanent and transitional) who raise children with

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321. Consider, for example, Lucie White's account of the experience of one welfare recipient in a regulatory regime that has become increasingly rule-bound over the last decade:

In Mrs G's experience, these highly formalized rules . . . also keep people in fear. First of all, "churning," the occasional, arbitrary termination of large numbers of people for technical reasons, has the effect of keeping all recipients uncertain about whether their next check will come. And the technical rules, although they appear very rigid, actually conceal countless enclaves of discretion, hidden places for harassing clients who get out of line, and obscuring the human agency behind that harassment. Mrs. G believed that "going to legal aid" or "asking for a hearing" were the best ways to make sure that this discretion would be used against her.

White, *supra* note 229, at 35-36.

322. Lucie White's account is one of the most compelling documentations of this futility. Others include Simon, *supra* note 117, at 1499-1504, and *Legality, Bureaucracy, and Class*, *supra* note 229, at 1198-99; and J. MASHAW, *BUREAUCRATIC JUSTICE* (1983).

323. So unnerving is the prospect of dependence—to feminists as well as liberal legalists—that I was often tempted to substitute the safer word "interdependence" to describe the state of connection of which our law must learn to take account. But "interdependence" is a word steeped in the ethic of bargains, mutuality and pacts. Doesn't it feel safer precisely because it is a shorthand for "I will admit I am dependent upon you if you will admit you are dependent upon me"? We can agree to be careful with each other because we have confirmed that each can destroy the other. While I believe that the mutuality of dependence is ultimately true and that we must recognize the damage to officials individually and to us collectively when public power is abused, *see infra* text accompanying note 333, we cannot forget the first lesson of power: The potential victim always has more to lose than the potential abuser. And so I have foregone the comfort of "interdependence." I fear that our thinking—particularly about due process—has been so thoroughly addicted to contractarianism that we cannot afford even the smallest opportunity to preserve the illusion that government power can be disarmed through bilateral negotiation if rights just give the citizen enough bargaining chips.



love and discipline without making them feel smothered or abused, good teachers who share knowledge with students without making them feel ashamed of what they do not know, and good caretakers who lend strength to those who are in need of support without making them feel less than human for their need. From these experiences, we would know that humans can respond to even great disparities in power with compassion, responsibility and respect. And so we would have hope that human organizations could be structured to enshrine and nurture such response. At the same time, however, we would remember that families, schools and institutions have also been the sites of the most terrible violence to personhood. From this hard-won consciousness of oppression, we would know that a sentimental view of relationship can mask the cruel exploitation of imbalances in material, intellectual or psychological resources. And so we would be wary to ferret out the domination that may hide in situations of dependence. We would, in short, recognize (in yet another way) that the personal is political, as we discover that we are trying to achieve in our public life what we try to achieve in our private lives: individuation without severing connection, dependence without victimization, relationship in which selfhood is found rather than lost.

Once we reconceive *what* we are trying to do, we would have a very different understanding of *how* we should go about doing it. Due process jurisprudence has long claimed a special fluidity and sensitivity to context.<sup>324</sup> Until now, however, we have been caught within the liberal-legalist drive towards determinacy, predictability and universality. Each case bore the normative responsibility of producing and conforming to abstract decisional principles capable not only of being applied, consistently and unequivocally, across the vast range of administrative contexts but also of being translated, without underprotectiveness or overintrusion, to substantive due process, takings and criminal, quasi-criminal and traditional civil adjudication.<sup>325</sup> This ideological pressure to create a monolithic, self-subsistent doctrinal system left us precious little room for adaptability and innovation—and even less chance

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324. The classic statement is Justice Frankfurter's:

"[D]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances . . . . "[D]ue process" cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, "due process" is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment . . . .

Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring).

325. Judge Posner provided one of the most memorable expressions of this view. A school employee, who had been induced to leave another position by school board assurances of at least two-years' job security, was terminated after one year without explanation or hearing. A majority of the panel held the employee had a property interest sufficient to implicate due process. Judge Posner launched his dissent by warning, "If this logic is applied unflinchingly, any time a school board or any other local government body breaks a contract without first holding a hearing, the contractor—who need not be an employee, who could be a supplier of paper clips—can get damages in federal court." *Vail v. Board of Education*, 706 F.2d 1435, 1449 (7th Cir. 1983).

for success. Seeking some essential test by which to assay the diverse acts of disciplining prisoners and school children, suspending drivers' licenses and welfare benefits, terminating employment and parental rights, curtailing public programs, prosecuting public offenders, and compelling public access to beachfront property, we set up "liberty" and "property" as gatekeepers—and continually found them too niggardly or too lax. Seeking a unitary model of process that could handle the worst case scenario of criminal prosecution, we could only imagine variations on the adversarial judicial trial—and constantly found them costly and ineffective.

Now, however, we would accept from the outset that there are no universal, multi-purpose answers. Just as the nature and needs of relationships between persons vary over time and within setting, so it must be with relationships between citizen and government. As we work to understand and perfect those relationships through invocations of due process, we will discover no philosopher's stone by which to transmute the multitude of interests implicated by government actions, no single formula for a procedural panacea. Here, in particular, rights must be "the language of a continuing process rather than the fixed rules."<sup>326</sup> We would, in short, make a true commitment to developing a flexible, contextually-sensitive due process jurisprudence. We would go about elaborating the meaning of *due* process not by trying to define the abstract essence of the duty to take care, but by trying to understand what taking care means in particular settings.<sup>327</sup> When we contemplate the multiplicity of government-citizen interactions, we would not see chaos threatening to overwhelm legal order and stability unless reduced to a finite and predictable set of categories. Instead, we would see in each situation an opportunity to observe, and to integrate our observations, and to develop practices of responsible care-taking, and improve our practices. We would recognize the challenge of the undertaking, but we would not fear that we could not tell a person from a paper clip.<sup>328</sup> And if the solutions we devise turn out to be underprotective or overintrusive, we would not condemn the enterprise on grounds that the welfare state is fundamentally irredeemable, or the activity of constitutional adjudication necessarily limited, or human nature essentially unchangeable. Skeptical of the existence of absolute truths (or at least of our ability to

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326. Minow, *supra* note 298, at 1876.

327. A standard practice is to begin with concrete experiences, integrate these experiences into theory, and rely on theory for a deeper understanding of the experiences . . . Rather than working deductively from abstract principles and overarching conceptual schemes, such analysis builds from the ground up.

Rhode, *supra* note 254, at 621 (citations omitted).

328. See *supra* note 325. One could perhaps hypothesize a situation in which a contract to sell government some commodity might be so critical, not simply in economic but in psychological terms, to a person's sense of self that we would think of its termination as if it were his job directly on the line. But even in the enterprise of imagining this unusual and fact-specific case, we demonstrate our ability to distinguish it from the garden variety contract to supply paper clips. Only the strength of the liberal-legalist mindset makes us feel defensive about insisting that we know the difference.

recognize them),<sup>329</sup> we would recognize the difference between what cannot be accomplished, and what we have not managed to accomplish—yet.

The transformations, radical and subtle, within the doctrine that would follow such a reconception of the goals and nature of due process jurisprudence are hard to imagine. But some things seem apparent.

Our thinking about what interests “trigger” due process would not be caught in the positivist trap, for we would neither fear the perils nor yearn for the solutions that made the trap so fatally seductive for liberal legalism. For one thing, positive law would no longer appear the safe haven of judicial legitimacy. Once we abandon, as undesirable as well as impossible, the picture of adjudication as a value-neutral exercise in detached ratiocination, we will measure the legitimacy of judicial action not by *whether* it furthers some particular set of values, but rather by *which* values it furthers. In searching for the values that will foster human flourishing, we would understand that a positive law pedigree can provide no imprimatur. Consent is too surely contingent and too often compromised and is, in any event, not the sole touchstone of civic responsibility. In locating the meaning of government’s duty of care, we would recognize that the outcome of the political processes can be but one source to consult.<sup>330</sup>

In addition, the shadow of *Lochner* would recede as we accept the possibility that procedural due process implicates different interests than those which trigger substantive due process and takings analysis. Thus far, we have been confounded by the riddle of how the Constitution could intervene to mandate procedural protection for deprivation of an interest it did not require government to provide in the first place. Now, however, we would see the animating concern of procedural due process to be *how* government treats its people; *what* it is taking from them is significant only indirectly. To be sure, the importance of the benefit or burden at stake would be relevant in specifying responsible official behavior. Some interactions between government and citizen would doubtless involve sufficiently inconsequential harm as to fall below some minimal standing threshold.<sup>331</sup> And in thinking about what practices constitute the taking of care, we could not ignore the interplay of substance and procedure.<sup>332</sup> We would, however, understand that the protection

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329. Bartlett, *supra* note 297, at 885.

330. Hence we would reach a doctrinal point that has long seemed to us essential—that due process protection does not depend upon the terms of simple-majoritarian law—but by a very different route than any that liberal legalism could imagine.

331. Another sort of harm that might not be met with process (or, at least, with *individualized* process) is harm that is shared in kind by a large, indefinite group of persons. We might well maintain the presumption, established at the turn of the century by the *Londoner* and *Bimetallic* cases, *see supra* note 53, that individualized process is needed when government singles out a citizen for harm based on her particular circumstances, but that only “legislative” process is due when the harm falls comparably upon many citizens—especially if our notion of due process of law/rule-making were enriched (to attempt to address failures in the legislative process) by something like Laurence Tribe’s concept of “structural justice.” L. TRIBE, *supra* note 50, at 1673-1687. *See also* Tribe, *supra* note 86.

332. We could not, for example, simply ignore the impact of procedural costs. Care-taking practices are ones which attempt to accommodate responsibilities to all who are dependent, including other present

of relationship is different than the protection of things. We would recognize that we do not have to think about a claim that government must take care in distributing benefits or imposing burdens as if it were a claim that government must distribute benefits or may not impose burdens.

In this sense, we would pursue the important insight of dignitary theorists that the primary focus of procedural due process should be on the quality of the interaction between government and citizen. However, because we would understand the nature and implications of that interaction very differently, we could avoid the pitfalls that condemned those theorists, within their liberal-legalist framework, to failure.

For one thing, if we concluded that, in a particular regulatory context, practices of care required the opportunity for revelation and participation, we would not be stymied by the "use as means" dilemma. Understanding personhood as a continually and necessarily interactive process rather than as a static and self-sufficient state, and viewing interchange with others as the way in which knowledge, desires and values are created rather than as a mutually exploitative confrontation, we would not regard the responsibility to communicate with another as a reduction to mere means. Indeed, affirming such a responsibility would be one of the clearest commitments to nurturing the personhood of both citizen and government official. *Each* participant in the dialogue is understood as helpful, and indeed necessary, to the fulfillment of the other. We have always assumed that the official has information which could help the citizen better order her life, presently and in the future; we would now affirm, as equally important, that the citizen has information which could help the official better do her job, presently and in the future. If knowledge is situated in context and contingent upon perspective, then a decision-maker cannot learn to use her power wisely unless she listens to those who are affected by her decisions. Perhaps more important, in the act of interchange itself we create at least the potential for citizen and official to discover their commonality. If the responsible and careful use of power is rooted in the

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and future beneficiaries. Cf. Whitbeck, *supra* note 298, at 56 (moral theory must take as important problem "how to elaborate ways of resolving conflicting responsibilities to dependent particular others"); Henderson, *supra* note 298, at 1584 ("[I]t is not impossible both to empathize with the suffering that often produces the sociopath and to accept the necessity of removing him or her from society.").

At the same time, "substantive" programmatic rules could not be categorically off-limits. For instance, AFDC regulations that impose federal penalties on states for wrongly *providing* benefits but not for wrongly *denying* them, see White, *supra* note 229, at 25 n.85, would be a prime suspect in any real assessment of care-taking administration. See also Nedelsky, *supra* note 254, at 32-34 (suggesting that AFDC practice of unannounced home searches is inherently incompatible with autonomy of recipient). Moreover, it may be impossible to create an environment in which government officials are able to respond with compassionate professionalism if they do not have minimally adequate programmatic and support resources to do their job. See *supra* note 303 (perceived inability to help can lead to defense of indifference or blaming person in need). Of course this means that, at some point, funding may be directly implicated, and with that the "substantive" due process questions of constitutionally-mandated redistribution. I am not suggesting that our reconception of the relationship between citizen and government in the regulatory state can ultimately avoid those questions. They are a crucial part of the task of value-definition that feminist theory realizes the need to undertake. See *supra* text accompanying notes 307-10. I *am* suggesting that there is much we can do in procedural due process short of having fully resolved them.

recognition of connection, then *both* participants have a stake in practices that facilitate this recognition. We have long believed that the citizen's personhood is diminished when an official of her government treats her with careless indifference or contempt; we would now affirm, as equally important, that the personhood of the official is also imperilled when she is encouraged to think of others as unimportant or contemptible.<sup>333</sup>

In addition, we would no longer be mesmerized by the shining coils of consent. That a citizen "chose" to enter a regulatory program or other relationship with government in the face of meager statutory procedures would become, for several reasons, a far less significant factor in the inquiry. Appreciating the complex dynamics of choice, we would beware the false equality that would treat an individual "choosing" to apply for social welfare benefits like a corporation entering into a defense contract, or a file clerk "choosing" to take a public sector job at minimum wage like a highly-compensated scientific consultant. Moreover, no longer conceiving individual existence as the single-minded pursuit of preexisting preferences, we would no longer equate individual moral responsibility with the tight-lipped endurance of the choices one has made. Perhaps most importantly, believing that our identity as persons and as a people depends in significant ways upon the quality of our public activities, we would find incomprehensible the notion that forms of interaction which encourage officials to experience public power as an occasion for hard bargains or easy conquests could be deemed acceptable so long as citizens "have a choice" about enduring them.

This consciousness that the manner in which our government wields its power shapes, for good or ill, our public and private character would similarly minimize concern about what procedures government, or its officials, had "consented" to provide. As I have just suggested, we would not conceptualize a duty to engage in dialogue about the reasons for official action as a "use" of the government decisionmaker which could be legitimate only if consensual. But even apart from this, we would be prepared to recognize obligations of care that are rooted in a person's *status* as a public official and in the *fact* of her possession of public power upon which citizens are dependent.<sup>334</sup> So long as we were caught in the liberal-legalist obsession with consent—whether of the citizen-individual, the official-individual, or the majority—we invited decisions (like *Meachum*) that public officials could inflict harm for reasons

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333. Cf. Henderson, *supra* note 298, at 1586 (citing studies showing that people's empathic response will be reduced if they are instructed to view victim in detached way); Mashaw, *supra* note 224, at 43 & n.55 (citing three Social Security Administration studies confirming that face-to-face encounters with claimant have substantial positive correlation with acceptance of claim). See generally KATHY FERGUSON, *THE FEMINIST CASE AGAINST BUREAUCRACY* 83-153 (1984) (discussing dynamics of bureaucratic organizations that dehumanize both employees and clients).

334. In conceiving public office-holding as a relationship with citizens, we would reject the liberal-legalist view of the administrator as an individual who happens to possess public power. "The concept of a relationship . . . contrasts with the notion of a role as something that a person can take on and later reject and be no more affected by than the clothing one has temporarily worn." Whitbeck, *supra* note 298, at 77.

they took no care in establishing because no one ever said they would act for reasons, and arguments (like that of monopoly theorists) that government is presumptively entitled to be as arbitrary in dealing with persons as any other actor in the market, and wistful statements (sprinkled in the commentary) that it would be *nice* if government wouldn't strike hard bargains with citizens but it isn't "law." Now, however, we would respond, "Why shouldn't it be law?" The conviction that the exercise of public power entails duties of care and responsibility is central to our collective understanding that our government aspires to be limited, democratic and public-regarding. This conviction has impelled us to struggle against the image of largess and the right/privilege distinction even as we were helpless (within liberal legalism) to avoid them. That we can not spell out, in advance and as a series of self-executing principles, the particular care-taking practices required in the range of government activities does not make the conviction less real, or less important to our image of ourselves. Once we cease to regard consent as the alpha and omega of responsibility, and neutral determinacy as the desideratum of constitutional principle, we can begin to insist, directly and straightforwardly, that government and each of its officials always have a duty to treat citizens responsibly and with concern and respect.

The doctrine through which we implement this insistence would never contain the standards requirement.<sup>335</sup> As official discretion increases, so does the need for inquiry into the carefulness with which power is exercised. Although we have always realized this, until now there was little we could do about it. Limited (at least for purposes of crafting legal rules) to modeling human interaction as egocentric, self-serving and opportunistic, we could imagine only process that was designed to compel those with power to yield. Limited to regarding process as compulsion, we had to provide for the possibility of outside (i.e., judicial) policing. And limited to accepting judicial activity as legitimate only when it neutrally enforces values generated by the political process, we could authorize courts to intervene only where there were "judicially manageable" (i.e., mandatory, explicit, substantive) standards. Now, however, no longer limited to these assumptions about human response to power, the purpose of process, or the criteria of legitimate adjudication, we could openly acknowledge here—as we do everywhere else in administrative law<sup>336</sup>—that official discretion is inescapable. And our due process jurisprudence could then begin to try to discover practices that induce officials to use this inevitable power with wisdom and compassion, for we would recognize that discretion (like dependence) represents far greater capacity for good, and for evil, than liberal legalism ever acknowledged.

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335. That is, the present doctrinal insistence on explicit, mandatory, substantive standards meaningfully constraining official discretion.

336. See, e.g., Rakoff, *supra* note 49, at 174-75 (administrative law "consider[s] the control of discretionary power as its *raison d'être*").

In this search for practices that foster the benign use of discretion, we would be both inspired and compelled to push our thinking beyond the narrow limits of adversary trial procedures. We would be inspired by our more hopeful view of human nature. Knowing that people are capable of using power responsibly and regardfully, we would realize that such capacity is not nurtured by encouraging official and citizen to regard each other as combatants, or by framing their interactions on the assumption that each will take advantage of the other whenever possible. For our litigation-bound legal consciousness, imagining alternative ways of proceeding that facilitate empathetic and nonadversarial decisionmaking is not easy, but there are signs that it is possible. With our rising interest in alternative dispute resolution techniques, we are slowly reaching out to other disciplines—psychology, sociology, anthropology—to broaden our conception of problem-solving methods.<sup>337</sup> Specifically within regulatory programs, the work of William Simon, Joel Handler and others reveals the possibilities and incidents of more humane practices of public administration.<sup>338</sup>

And if, discouraged by the difficulty of unfamiliar terrain and the intransigence of bureaucracy, our inspiration to search for these alternative practices wanes, we would nonetheless be compelled to continue by our recognition that adversary process in the administrative state rarely secures even the limited goals liberal legalism had set it. A feminist due process jurisprudence might not abandon the concepts of rights-as-swords-and-shields and process as battle, but it would not ignore how frail these concepts become when invoked in the real world of regulatory power. Through the work of Lucie White, William Simon, Austin Sarat and others, we have discovered how little security, autonomy and protection from arbitrariness citizens obtain from even the plenary "fair hearing" *Goldberg* provided in the welfare context.<sup>339</sup> In part, this is because process crafted for the strong, articulate and self-sufficient does not meet the needs of the downtrodden, silenced, and subordinate. But the disjunction between the ideal liberal-legalist protagonist and the real citizen-

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337. To be sure, we have discovered that such processes do not always succeed, and indeed have sometimes reinforced existing patterns of exploitation. See, e.g., Lisa Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984); Janet Rifkin, *Mediation from a Feminist Perspective: Promise and Problems*, 2 J. LAW & INEQ. 21 (1984); Minow, *Interpreting Rights: An Essay for Robert Cover*, *supra* note 298, at 1907 n.193; Rhode, *supra* note 254, at 632 & n.54 (collecting sources). Perhaps this discovery is simply a reminder that alternative forms of process (no more than traditional forms) cannot be imposed without reference to context, or expected to "work" immediately and without adjustment.

338. See, e.g., Simon, *Invention and Reinvention*, *supra* note 229 (describing Social Work Jurisprudence); JOEL HANDLER, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY* 79-120 (1986) (describing one school system's cooperative approach to special education rights); J. MASHAW, *supra* note 43, at 264-67 (describing Veterans Administration).

339. See, e.g., White, *supra* note 228; Simon, *Legality, Bureaucracy, and Class*, *supra* note 229; Austin Sarat, ". . . The Law Is All Over": *Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343 (1990); Robert Scott, *The Reality of Procedural Due Process—A Study of the Implementation of Fair Hearing Requirements by the Welfare Caseworker*, 13 WM. & MARY L. REV. 725 (1972).

seeking-government-services is not the only reason why adversary process fails. As even the most resourceful lawyer working for the most sophisticated and affluent client well knows, formal procedural weapons—no matter how skillfully wielded—provide only a limited defense against hostile or irresponsible officials. If the administrative state is a state of war, then victory will always go, in the end, to the one who is at home in the regulatory jungle.

The only sane solution, in the long run, is to recast the activity as peace, and to fashion administrative environments that concentrate on inducing officials to be their best, rather than on trying to block them from being their worst. Hence, if we do resort to patterns of adversarial process, we would be mindful of their decidedly second-best quality and their limited utility. We would recognize that, to be even minimally useful to the citizens they are supposed to protect, they often require far more supporting services than we have been accustomed to provide.<sup>340</sup> In the end we would, perhaps, be most comfortable regarding them as transitional devices, imperfect stopgaps awaiting our discovery of a way to heal a particularly unhealthy regulatory interaction.<sup>341</sup>

We frequently have been told that the goal of making public administration careful, compassionate, and courteous is utterly beyond the power of constitutional law. Until now, this was surely so. So long as human nature is modelled as fixed and the proper role of judges is prescribed as merely ending particular disputes through disinterested application of preexisting neutral rules, it is nonsensical (even threatening) to speak of the symbolic and transformative potential of constitutional adjudication. So long as courts preside over a ritualized form of combat in which truth emerges victorious from confrontation, it is ludicrous to think that the loser can be ordered to love one who has been cast, from the outset, as his enemy. If, however, we understood our individual and collective identity as a constantly evolving, interactive process as much shaped by, as shaping, such culturally important activities as constitutional adjudication, then we would realize the self-fulfilling quality of predictions about what those activities can accomplish. We are a society in which judgments about the constitutionality of specific practices are frequently taken as judgments about the morality and appropriateness of those practices.<sup>342</sup>

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340. This means, at a minimum, the provision of skilled advocates for many claimants in social welfare programs. See Simon, *Legality, Bureaucracy and Class*, *supra* note 229; White, *supra* note 228, at 53-54. Lucie White hypothesizes a variety of more extensive supports, including the provision of linguistic and anthropological experts who could interpret and explain to decisionmakers the speech and behavior patterns of powerless people. White, *Id.* at 55-56.

341. From our very different set of starting points, we would have a very different expectation of what "normal," "healthy" interactions look like. "Instead of community and cooperation being taken as phenomena whose existence and even possibility is puzzling, and sometimes even regarded as impossible, the existence of egoism, competitiveness and conflict, phenomena which liberalism regards as endemic to the human condition, would themselves become puzzling and problematic." A. JAGGAR, *supra* note 254, at 41.

342. See generally Robin West, *Progressive and Conservative Constitutionalism*, 88 MICH. L. REV. 641 (1990).



For almost twenty years, due process adjudication has told administrators either that their "clients" have no right to complain about how they have been treated ("no standards, no obligations") or that they themselves can't be trusted to do their job right ("courts decide what process yields accurate decisions"). When these are the messages it has been sending, is it any wonder that contemporary procedural due process jurisprudence has not contributed to—and may indeed have undermined—the emergence of a responsible, committed and humane public administration?<sup>343</sup>

How do we know what might be possible if procedural due process adjudication became a self-consciously value-generating activity in which all participants come together to discover what is right, rather than a battle in which wrongdoers are unmasked and forced to yield? Hard as it is for us to think about litigation in this way,<sup>344</sup> there are even in our present world faint glimmers of hope that such an alteration is possible. Sometimes, in institutional and other complex litigation, trial judges (or their masters) find ways to refocus the adversarial, blame-inflicting tendencies of litigants and emphasize forward-looking, collaborative approaches to finding solutions. Working from a set of feminist understandings and methods, we might actually achieve the transformation of adjudication that could, in turn, transform what procedural due

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343. It seems possible that the tendency to conflate judgments about constitutionality with ones about wisdom, morality or appropriateness is especially great in an area like procedural due process.

When private parties leave the courtroom with a declaration of their legal duties to one another, they reenter a world of family, business, religious, and social networks which contain their own norms of acceptable behavior. The literature on relational contracts, for example, emphasizes the existence of incentives to fulfillment of contractual expectations that operate independent of legal enforceability. See, e.g., IAN MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980); *Symposium: Law, Private Governance and Continuing Relationships*, 1985 WISC. L. REV. 461. See also Melvin Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 2 (1979) ("Withholding legal enforcement from a promise does not license its breach. A promise-breaker may lose business, friends, or self-respect and the prospect of such losses may be more of an impetus to performance than the prospect of money damages.").

It is not so clear that social, economic, moral or religious forces operate in the same ways to constrain the "business" conduct of government officials—particularly if the official is part of a large bureaucracy insulated from the local community by its "federal" character. Drawing on social science as well as on history, Robert Cover reminded us, "Persons who act within social organizations that exercise authority act violently without experiencing the normal inhibitions or normal degree of inhibition which regulates the behavior of those who act autonomously." Cover, *Violence and the Word*, *supra* note 271, at 1615. Indeed, bureaucracies may deliberately condition their component members to leave personal values at the door when they enter:

Administrative man accepts the organization goals as the value premises of his decisions . . . .

What is perhaps most remarkable and unique about administrative man is that the organizational influences do not merely cause him to do certain specific things (e.g., putting out a forest fire, if that is his job), but induce in him a habit pattern of doing *whatever* things are appropriate to carry out in cooperation with others the organization goals.

Robert Denhardt & Jan Perkins, *The Coming Death of Administrative Man*, PUBLIC ADMIN. REV. 379 (July/Aug. 1976) (quoting organization theorist Herbert Simon) (emphasis in original). See also K. FERGUSON, *supra* note 333.

Hence, it may be that decisions about legal, and particularly constitutional, obligations readily become the sum and substance of administrative morality—particularly in underfunded programs in which workers, overwhelmed by unmet need for services, may cling to any justification for neglectful behavior.

344. See, e.g., Ruth Colker, *Feminist Litigation: An Oxymoron? - A Study of the Briefs Filed in William L. Webster v. Reproductive Health Services*, 13 HARV. WOMEN'S L.J. 137 (1990).

process jurisprudence can accomplish. From our understanding of the nature and sources of knowledge, we would recognize the importance of a judicial approach that actively seeks out the perspectives of those who live and shape the particular regulatory situation. We would not minimize the challenge of comprehending and appropriately integrating the experience of the welfare recipient or the front-line agency worker. But we would recognize that listening to these voices *in addition to* the voices of agency administrators and lawyers is not a matter of pluralism or equal time or simple courtesy. It is an epistemological and remedial imperative. We would realize that sound solutions can not be developed, let alone successfully implemented, through a process in which isolated judges formulate and deliver answers from on high.<sup>345</sup>

What we would learn from this commitment to broadened participation in the discovery of due process answers might at times be difficult for us to accept. Perhaps, for example, we would be forced to acknowledge that the process patterns of revelation and participation, which have had a remarkable currency across political and philosophical camps, are the process ideals of an elite—we lawyers, scholars, and judges for whom words are powerful instruments and comfortable extensions of self. We would constantly be required to reassess our expectations not simply of what sort of process is good (is the interjection of lawyers anything other than the interjection of adversarialness?), but even of what sort of process is possible (what if a panel of welfare recipients from the community helped make continued eligibility determinations?).

And this continual reminder of the limits of our understanding of a complex world would further transform procedural due process jurisprudence, as we openly admit to the provisional, modifiable, even experimental character of the answers that emerge. The concept of solutions that depend upon context, and are modifiable with new information and circumstance, has never been completely alien to adjudication. Equity practice, particularly the injunction, has long included a self-conscious commitment to flexibility and adaptability.<sup>346</sup> However, so long as liberal legalism modelled law as the marking of

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345. Because I have been focusing on procedural due process as legal doctrine, the discussion has largely proceeded from the perspective of the judiciary. But the rejection of "top down" solutions necessarily implies that ways of thinking about process and about the "ethic" of government power must change *within agencies themselves*. On this point, such work as William Simon's retrieval of the professional belief system of Progressive Social Work becomes enormously valuable. As Simon's work also shows us, however, the evolution of an agency's character can be affected by the course of procedural due process adjudication. Suppose, for example, that courts explicitly said (and really meant) that they would show deference to agency-crafted procedures if, *but only if*, the agency had arrived at those procedures after deliberate study of how the needs and abilities of its client population could be accommodated, responsibly and respectfully, in light of its programmatic goals and resources. Suppose also that, if the agency had not previously engaged in this sort of professional self-evaluation, courts responded, at least in the first instance, by encouraging the parties to undertake it cooperatively under the auspices of some court-appointed facilitator.

346. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . . .  
Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944).

boundaries between opposing camps and adjudication as the public declaration of right-holder and wrongdoer, it was almost impossible for courts to avoid pronouncing absolute, timeless truth that could be altered only by a system-wrenching confession of error. Now, however, we would recognize that being "correct" in due process adjudication—as in any of the other practices by which we seek to understand and enrich our lives—is a matter of being situated in particular perspectives upon which we are obligated, always, to try to improve.<sup>347</sup> And we would come to see in the continual, contextual reexamination of the practices we devise not the sign of failure, but rather the promise of success.

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If it seems to you that I am conjuring up a world thoroughly familiar at one moment and utterly unrecognizable at the next, I think you are right. That is why, at the outset, I invoked the metaphor of the damask, the cloth which, when reversed, reveals an image at once remembered and never seen before. Conceiving a new procedural due process requires not that we abandon everything we have known and been—an effort which (even if possible) could only be profoundly disorienting—but rather that we allow ourselves to believe in everything we might be. From understanding what we are, as persons and as citizens poised at the end of a century of enormous public and private transformation, we learn both why we must change this law, and how we can. In one of the earliest efforts to describe a feminist jurisprudence, Ann Scales—no naive utopian—wrote:

It is insane at the end of the twentieth century to adhere to the belief that people are innately horrid and can not do better. Rather, we must recognize that our fears—of contingency, of dependency, of unimportance—have put us on a suicidal path. We need now to embrace the lesson of Darwin—that we are a self-creating species.<sup>348</sup>

In its short but intense lifetime, procedural due process jurisprudence has often flirted with the lure of constitutional Darwinism. It is time to surrender—not to a seductive lie that we can save a few of us, if only we would be "realistic," but rather to a quickening truth that we can save all of us, if only we would dare to have faith.

Even science—that most radically conservative of disciplines<sup>349</sup>—knows

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347. See Bartlett, *supra* note 297, at 832.

348. Scales, *supra* note 254, at 1393 (citations omitted).

349. See FRANK WILCZEK & BETSY DEVINE, *LONGING FOR THE HARMONIES: THEMES AND VARIATIONS FROM MODERN PHYSICS* 25-28 (1987).

that when, despite the best and most determined efforts, existing assumptions cannot accommodate new phenomena, it is time to find a fundamentally different way of thinking about the world.<sup>350</sup>

Even science—that discipline most dedicated to discovering how things “really” are—knows that truth often is created by how you choose to seek it.

*“[I]f we ask a particle question,  
we will get a particle answer;  
if we ask a wave question,  
we will get a wave answer . . . .”*<sup>351</sup>

*No answer is what the wrong question begets . . . .*

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350. See generally THOMAS KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970).

351. A. JAGGAR, *supra* note 254, at 368 (quoting Fritjof Capra).